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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

Topic Summary | Correlation Table

Research References

West's Key Number Digest

West's Key Number Digest, Water Law 1455 to 1458, 1464 to 1468, 1470 to 1488, 1490, 1491, 1493 to 1498, 1500 to 1517, 1519 to 1522

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

1. In General

§ 293. Bed and bank defined

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455

The "bed of a river," or "other body of water," has been defined as that portion of its soil which is alternately covered and left bare, as there may be an increase or diminution in the supply of water, and which is adequate to contain it at its average and mean stage during the entire year, without reference to the extraordinary freshets of the winter or spring, or the extreme droughts of the summer or autumn.[1] The bed of a river or other body of water includes the shores[2] but does not include lowlands which, although subject to frequent overflow, are valuable as meadows or pastures.[3]

The bank of a river, or other body of water, is the watershed and relatively permanent elevation or acclivity at the outer edge of the bed of the river or other body of water, which separates the bed from the adjacent upland and serves to confine the waters within the bed and to preserve the course of the river or other body of water.[4]

Footnotes

1 U. S. v. Chicago, M., St. P. & P. R. Co., 312 U.S. 592, 313 U.S. 543, 61 S. Ct. 772, 85 L. Ed. 1064 (1941).

2 Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n, 57 Fla. 399, 48 So. 643 (1909).

3 Clement v. Watson, 63 Fla. 109, 58 So. 25 (1912).

4 State of Okl. v. State of Tex., 260 U.S. 606, 43 S. Ct. 221, 67 L. Ed. 428 (1923).

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A. Beds, Banks, and Shores

1. In General

§ 294. Shore defined

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455

A "shore" is defined as the land on the margin of a sea or lake or river,[1] or the land adjacent to large bodies of water.[2] A "shore" also is defined as that space of land which is alternately covered and left dry by the rising and falling of the tide,[3] or the space between the high and low water marks.[4] It is synonymous with the term "beach."[5]

The term "shore lands," as applied to lands along the margin of a tideless body of water below the ordinary high-water mark but without any defined outer boundary, includes the land to the line of navigability.[6]

Observation:

The term "tidelands" has been defined in a similar manner as the term "shore" and are the lands between the lines of mean high tide and mean low tide.[7] On the other hand, submerged lands are those lands seaward of mean low tide and not uncovered in the ordinary ebb and flow of the tide.[8]

CUMULATIVE SUPPLEMENT

Cases:

North Carolina's ocean beaches are made up of different sections: the "foreshore," or "wet sand beach," is the portion of the beach covered and uncovered, diurnally, by the regular movement of the tides, and the landward boundary of the foreshore is the mean high water mark; the "dry sand beach" is the portion of the beach landward of the mean high water mark and continuing to the high water mark of the storm tide, the landward boundary of which will generally be the foot of the most seaward dunes, if dunes are present, the regular natural vegetation line, if natural vegetation is present, or the storm debris line, which indicates the highest regular point on the beach where debris from the ocean is deposited at storm tide. Nies v. Town of Emerald Isle, 780 S.E.2d 187 (N.C. Ct. App. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Com. of Massachusetts v. State of New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926).

2 Axline v. Shaw, 35 Fla. 305, 17 So. 411 (1895).

3 Com. of Massachusetts v. State of New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926).

4 Com. of Massachusetts v. State of New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926).

5 Com. of Massachusetts v. State of New York, 271 U.S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926).
The primary meaning of the word "beach" is the land between the ordinary high-water mark and the low-water mark. Boylan v. Borough of Point Pleasant Beach, 410 N.J. Super. 564, 983 A.2d 1122 (App. Div. 2009).

6 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).

7 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921); City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).
Tidelands are lands usually or ordinarily covered and uncovered during every 24-hour period by the action of the tides. State By and Through McKay v. Sause, 217 Or. 52, 342 P.2d 803 (1959).
As to the Coastal Zone Management Act (16 U.S.C.A. §§ 1451 et seq.), which addresses the protection and management of the coastal waters of the United States and adjacent shorelands, see Am. Jur. 2d, Pollution Control §§ 1034, 1035.

8 City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

1. In General

§ 295. Jurisdiction over lands associated with waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455

The jurisdiction of a state over the lands within its territory includes the beds of streams and other waters.[1] The clause of the Federal Constitution which declares that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction does not affect the jurisdiction nor the legislative power of the states over so much of their territory as lies below high-water mark except that their legislation must not conflict with the admiralty jurisdiction or laws of the United States.[2]

The territorial jurisdiction of a state over the bed of a navigable river within its boundaries is not affected by its occupation by the United States for the purpose of constructing a dam.[3]

Footnotes

1 State of Kan. v. State of Colo., 206 U.S. 46, 27 S. Ct. 655, 51 L. Ed. 956 (1907).

2 The Volant, 59 U.S. 71, 18 How. 71, 15 L. Ed. 269, 1855 WL 8275 (1855).

3 Atkinson v. State Tax Commission of Oregon, 303 U.S. 20, 58 S. Ct. 419, 82 L. Ed. 621 (1938).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

2. Ownership and Use

a. In General

§ 296. What law governs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455

The rights and interests in the beds of streams and other bodies of water depend upon and are governed by the local law, subject to the paramount rights of the government of the United States,[1] each state being at liberty, subject to constitutional limitations upon interference with vested rights, to determine over what submerged lands its sovereign prerogative of ownership shall be exercised.[2] Accordingly, the question of how far the title of a proprietor of land on a margin of a navigable river extends, whether to the high-water mark, low-water mark, or the middle of the stream, is usually to be determined by the laws of the state in which the land is situated, as declared by its statutes and judicial decisions.[3] This rule has been applied even in cases involving the construction of a federal grant.[4] The State may also decide the ownership of submerged lands, irrespective of the navigable or nonnavigable character of the waters above them.[5]

As between the federal and state governments, the proper location of the boundary of a proprietor of land on a margin of a navigable river, that is, whether it should extend to the high-water mark, low-water mark, or the middle of the stream, is to be determined by the laws of the state in which the land is situated.[6] Each state is free to adopt its own rules as to the extent of boundaries of tracts bordering on watercourses,[7] subject to the condition that such rules do not impair the efficacy of the grant or the use and enjoyment of the property by the grantee.[8] However, the construction of federal grants of land bordering on streams or other bodies of water, as passing the title of the United States to the land under such waters, or within the meander lines or surveys thereof, is a federal and not a state question[9] and involves the consideration of state questions only insofar as it may be determined as a matter of federal law that the United States has impliedly adopted and assented to a state rule of construction as applicable to its conveyances.[10] Where the title to the bed of a navigable stream on public lands has passed from the United

States to a state by virtue of its admission to the union,[11] the effect of a subsequent federal grant of land bordering on such stream, as passing title to the bed, depends upon the local law.[12]

The question of whether waters within a state are navigable, so that title to the underlying lands may be considered to have passed from the United States to the state upon its admission to the Union, is a federal question and not a local one even though the waters are not capable of use for navigation in interstate or foreign commerce.[13]

Observation:

Those states comprised of territory originally acquired from France, Spain, or Mexico were not originally subject to the common law,[14] and in such states, grants made to individuals by the original sovereignty before the cession of the territory to the United States are governed by the law under which they were made, but as to lands not granted at the time of the cession, the title to lands under waters is regulated by such rules as may be prescribed by the succeeding sovereignty.[15]

CUMULATIVE SUPPLEMENT

Cases:

Two related doctrines create a public right to use certain bodies of water, regardless of who owns the abutting upland: first, as to bodies of water that are considered navigable as a matter of federal law, title to the lands underlying those navigable waters passed to the state when Oregon was admitted into the Union, to be held in trust for the public uses of navigation and fishery; second there is a public right to use other waterways, even if title to the underlying land is privately held, as long as the water is navigable in a qualified or limited sense. Kramer v. City of Lake Oswego, 365 Or. 422, 446 P.3d 1 (2019).

[END OF SUPPLEMENT]

Footnotes

1 Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935).
State law ordinarily controls the questions of title to beds of nonnavigable lakes and streams unless the United States has expressed its intent when disposing of riparian lands. Yankton Sioux Tribe of Indians v. Nelson, 683 F.2d 1160 (8th Cir. 1982).

2 Hardin v. Jordan, 140 U.S. 371, 11 S. Ct. 808, 35 L. Ed. 428 (1891).

3 U.S. v. 1,629.6 Acres of Land, More or Less, in Sussex County, State of Del., 335 F. Supp. 255 (D. Del. 1971), opinion supplemented, 360 F. Supp. 147 (D. Del. 1973) and judgment aff'd in part, rev'd in part on other grounds, 503 F.2d 764 (3d Cir. 1974) (applying law of Delaware).

4 Whitaker v. McBride, 197 U.S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905); State v. Akers, 92 Kan. 169, 140 P. 637 (1914), aff'd, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917).

5 Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

6 Whitaker v. McBride, 197 U.S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905).

7 Whitaker v. McBride, 197 U.S. 510, 25 S. Ct. 530, 49 L. Ed. 857 (1905).

8 Packer v. Bird, 137 U.S. 661, 11 S. Ct. 210, 34 L. Ed. 819 (1891).

9 Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935).

10 Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935).

11 § 298.

12 Scott v. Lattig, 227 U.S. 229, 33 S. Ct. 242, 57 L. Ed. 490 (1913).

13 U.S. v. State of Oregon, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935); State v. Adams, 251 Minn. 521, 89 N.W.2d 661 (1957).

14 Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); Knight v. United Land Ass'n, 142 U.S. 161, 12 S. Ct. 258, 35 L. Ed. 974 (1891).

15 Manry v. Robison, 122 Tex. 213, 56 S.W.2d 438 (1932).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

2. Ownership and Use

a. In General

§ 297. Governmental control and regulation of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455

The State has the authority to regulate and control tidelands and submerged lands for the public use,[1] and the use of lands underlying navigable waters is subject to such governmental control and regulation as may be necessary for the protection and enjoyment of public rights in such waters.[2] Regulations adopted for such purpose must be reasonable, however, and must not unnecessarily interfere with private property rights.[3] Thus, the public policy of a state to preserve wetlands and to prevent their despoliation and destruction must be balanced against the interest of a private landowner who wishes to make productive use of his or her wetlands.[4]

The regulation of the use of land under navigable waters is properly the subject of the police power,[5] and the regulatory power of the State is sometimes delegated to a subordinate agency, such as a municipal corporation[6] or a special commission or agency.[7] The regulatory authority of the federal government in this connection is limited to matters pertaining to or affecting navigation or commerce,[8] but with respect to such matters, its authority is paramount.[9]

Footnotes

1 Graf v. San Diego Unified Port Dist., 7 Cal. App. 4th 1224, 9 Cal. Rptr. 2d 530 (4th Dist. 1992); Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995).

2 Silas Mason Co. v. Tax Com'n of State of Washington, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937); R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).

3 City of Janesville v. Carpenter, 77 Wis. 288, 46 N.W. 128 (1890).

4 Brecciaroli v. Connecticut Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975).

5 Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); Brecciaroli v. Connecticut Commissioner of Environmental Protection, 168 Conn. 349, 362 A.2d 948 (1975).

6 Jersey City v. Hall, 79 N.J.L. 559, 76 A. 1058 (N.J. Ct. Err. & App. 1910).

7 Graf v. San Diego Unified Port Dist., 7 Cal. App. 4th 1224, 9 Cal. Rptr. 2d 530 (4th Dist. 1992).

8 U.S. v. Appalachian Elec. Power Co., 311 U.S. 377, 61 S. Ct. 291, 85 L. Ed. 243 (1940).
The United States has a dominant navigational servitude in the navigable waters of the several states. U.S. v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974).

9 Silas Mason Co. v. Tax Com'n of State of Washington, 302 U.S. 186, 58 S. Ct. 233, 82 L. Ed. 187 (1937).

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2. Ownership and Use

b. Rules as to Ownership of Specific Beds of Bodies of Water

§ 298. Beds of navigable and tidal waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1457

Forms

Am. Jur. Pleading and Practice Forms, Waters § 9 (Motion—For declaratory judgment against state—To determine ownership of submerged oyster grounds)

The ownership of land under navigable waters is an incident of sovereignty.[1] As a general principle, the ownership of land under navigable waters is held in trust by the federal government for future states, to be granted to such states when they enter the union and assume sovereignty on an equal footing with established states.[2] This "equal footing" principle accords newly admitted states the same property interests in submerged lands as was enjoyed by the 13 original states as successors to the British Crown.[3] When a state enters the union, title to the land under, or the beds of, navigable waters or tidewaters within its boundaries passes from the federal government to it,[4] making each state the owner of such land within its limits.[5] Title to the beds of navigable waters thus is in the respective states unless granted away.[6] The State's title to the land under navigable waters or tidewaters is subject only to the reservation and stipulation that such waters forever be and remain public highways, with the right in Congress to regulate interstate and foreign commerce thereon.[7]

Practice Tip:

A court deciding the question of title to a bed of navigable water must begin with a strong presumption against defeat of the State's title.[8]

Footnotes

1 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

2 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981).

3 Utah v. U.S., 403 U.S. 9, 91 S. Ct. 1775, 29 L. Ed. 2d 279 (1971).

4 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997); Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988); U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931); Mesenbrink v. Hosterman, 147 Idaho 408, 210 P.3d 516 (2009).

5 Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988); U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931).

6 Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960).

7 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981); Causey v. Gray, 250 Md. 380, 243 A.2d 575 (1968).

8 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
An Indian tribe's showing of tribal dependence on a river and the government's awareness of that dependence did not overcome the presumption against the government's conveyance of the riverbed. U.S. v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502 (9th Cir. 1991).

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2. Ownership and Use

b. Rules as to Ownership of Specific Beds of Bodies of Water

§ 299. Beds of floatable waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1457

The title to the beds of streams which are merely floatable generally is vested in the riparian proprietors.[1] This is true where such streams are held to be nonnavigable[2] and also where they are classified as navigable in jurisdictions in which the title to navigable as well as nonnavigable streams is vested in the riparian proprietors.[3] The same rule has been applied also in several cases arising in jurisdictions in which such floatable streams are classified as navigable and in which the rule prevails that the title to the bed of navigable waters generally is vested in the state, a distinction being made in this respect between those streams which are navigable only in the sense of floatable and those which are navigable generally.[4]

Footnotes

1 Gratz v. McKee, 270 F. 713, 23 A.L.R. 1393 (C.C.A. 8th Cir. 1920), aff'd, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

2 Gratz v. McKee, 270 F. 713, 23 A.L.R. 1393 (C.C.A. 8th Cir. 1920), aff'd, 260 U.S. 127, 43 S. Ct. 16, 67 L. Ed. 167 (1922).

3 Ireland v. Bowman & Cockrell, 130 Ky. 153, 113 S.W. 56 (1908).

4 Blackman v. Mauldin, 164 Ala. 337, 51 So. 23 (1909).

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2. Ownership and Use

b. Rules as to Ownership of Specific Beds of Bodies of Water

§ 300. Beds of nonnavigable waters

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1457

The land under nonnavigable waters is subject to private ownership, and as a general rule, the title to it is vested in the proprietors of the adjoining uplands or their grantees, each taking, ordinarily, to the center or thread of the stream.[1] Title to the beds of nontidal waters passes into private ownership with the grant of the riparian land, absent express reservation.[2] When lands are conveyed with a nonnavigable watercourse described as a boundary, there is a rebuttable presumption that the grantor intends that the boundary of the lands of the grantee should extend to the middle of such watercourse.[3] However, and although there is some authority to the contrary,[4] where a watercourse was at one time in fact navigable and was recognized as such by both the state and national governments, the fact that it is later not navigable and is not used for navigation purposes at all does not change the title to its bed and bank from the State to the riparian owner.[5]

While the admission of a new state to the union operates to transfer to such state the title of the United States to lands underlying navigable waters within the state,[6] the title of the United States to lands underlying nonnavigable waters within the state remains unaffected by such admission,[7] and the federal government retains title to the beds of nonnavigable waters.[8] A state does not hold title to the beds under segments of a river that were nonnavigable at the time of statehood even if the remainder of the river was navigable.[9]

Footnotes

1 State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922); In re River Queen, 275 F. Supp. 403 (W.D. Ark. 1967), judgment aff'd, 402 F.2d 977 (8th Cir. 1968) (applying Arkansas law).

2 Town of North Elba v. Grimditch, 98 A.D.3d 183, 948 N.Y.S.2d 137 (3d Dep't 2012).

3 Am. Jur. 2d, Boundaries § 17.

4 U.S. v. 1,629.6 Acres of Land, More or Less, in Sussex County, State of Del., 335 F. Supp. 255 (D. Del. 1971), opinion supplemented, 360 F. Supp. 147 (D. Del. 1973) and judgment aff'd in part, rev'd in part on other grounds, 503 F.2d 764 (3d Cir. 1974).

Under Arkansas law, the State lost title to the riverbed when the water flow was diverted and the river became nonnavigable, and title to the riverbed vested in the riparian owners at the time of such diversion. U.S. v. Keenan, 753 F.2d 681 (8th Cir. 1985).

As to the effect of statutory declaration of nonnavigability, see § 301.

5 State v. Akers, 92 Kan. 169, 140 P. 637 (1914), aff'd, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917).

6 § 298.

7 U.S. v. State of Oregon, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935).

8 Mesenbrink v. Hosterman, 147 Idaho 408, 210 P.3d 516 (2009).

9 PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 182 L. Ed. 2d 77 (2012).

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A. Beds, Banks, and Shores

2. Ownership and Use

c. Constitutional or Statutory Provisions Affecting Title

§ 301. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1456

In some jurisdictions, the common-law rules as to the ownership of the beds of streams and other bodies of water have been changed or modified by constitutional or statutory provision.[1] In jurisdictions where the different streams have been classified by statute as navigable or nonnavigable and the title to the bed depends on the navigability of a stream, the bed of any stream which has been declared to be nonnavigable is in the riparian owner, whether the stream is navigable in fact or not.[2] A statutory declaration of nonnavigability in such jurisdictions operates as a transfer to riparian proprietors of the State's title to the bed of the stream or body of water in question.[3] A statutory declaration of navigability, however, will not affect rights or interests acquired in the bed of a stream by virtue of a prior valid grant from the federal government.[4]

A state statute adopting the common law of England as the rule of decision may operate as a transfer to all riparian proprietors of the title of the State to the bed of tideless waters.[5] State statutes qualifying the common-law rule as to the rights of riparian proprietors in the natural flow of a stream do not impliedly abrogate the common-law rule respecting riparian ownership of the bed of a nonnavigable stream.[6]

Observation:

The federal statute of limitations period provided for quiet title actions against the United States[7] applies to a state and its suit against the federal government regarding title in a riverbed, just as it would to any other entity, but does not affect the State's title

to lands beneath navigable waters since the land in question belongs to the State if the river is navigable, regardless of whether the State's suit to quiet title is time-barred under the statute of limitations.[8]

Footnotes

1 In re City of New York, 182 N.Y. 361, 75 N.E. 156 (1905).

2 Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).

3 Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913).

4 Brewer-Elliott Oil & Gas Co. v. U.S., 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922).

5 Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913) (applying California rule).

6 State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922).

7 28 U.S.C.A. § 2409a(g).

8 Block v. North Dakota ex rel. Bd. of University and School Lands, 461 U.S. 273, 103 S. Ct. 1811, 75 L. Ed. 2d 840 (1983).

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Waters
Janice Holben, J.D., Alan J. Jacobs, J.D., Jack K. Levin, J.D., and Eric C. Surette, J.D.

IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

2. Ownership and Use

c. Constitutional or Statutory Provisions Affecting Title

§ 302. Federal Submerged Lands Act

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1456

Congress, by the Submerged Lands Act of 1953,[1] ceded to the respective states title and ownership of lands beneath navigable waters within the state boundaries and the natural resources within such lands and waters.[2] The Submerged Lands Act does not alter the scope or effect of the equal footing principle, whereby new states, upon their admission to the union, acquire title to the lands underlying navigable waters within their boundaries, nor does it alter state property law regarding riparian ownership.[3] Indeed, the effect of the Act is to confirm and establish the states' title to the beds of navigable waters within their boundaries as against any claim of the United States government.[4]

As used in the Submerged Lands Act, the term "lands beneath navigable waters" means all lands inside the boundaries of the states covered by nontidal waters that were navigable under the United States laws at the time the State entered the union or acquired sovereignty; all lands permanently or periodically covered by tidal waters up to but not above the line of mean high tide and seaward to a line three geographical miles from the coast line of the state; and all filled in, made, or reclaimed lands that were previously beneath navigable waters.[5] The term, however, does not include the beds of streams in lands now or heretofore constituting a part of the public lands of the United States if such streams were not meandered in connection with the public survey of such lands under the laws of the United States and if the title to the beds of such streams was lawfully patented or conveyed by the United States or any state to any person.[6]

Exceptions to the rights of the states to submerged lands are made in the Submerged Lands Act, and it is declared not to apply to the authority and rights of the United States respecting navigation, flood control, and the production of power;[7] state laws relating to the ownership and control of ground and surface waters in states which lie wholly or in part westward of the 98th

meridian;[8] lands acquired by the United States from any state or by eminent domain,[9] and certain other lands held by the United States for the benefit of Native Americans;[10] structures and improvements constructed by the United States in the exercise of its navigational servitude;[11] and rights previously acquired under laws of the United States.[12] The Act further provides that the United States retains all its navigational servitude and rights in and powers of regulation and control of the lands and navigable waters within the purview of the Act, for the constitutional purposes of commerce, navigation, national defense, and international affairs,[13] and that the United States retains certain rights of purchase and of eminent domain with regard to the lands and natural resources in time of war or when necessary for the national defense.[14]

Observation:

Under the Submerged Lands Act, states enjoy a presumption of title to submerged lands beneath inland navigable waters within their boundaries and beneath territorial waters within three nautical miles of their coasts.[15] The federal government can overcome this presumption and defeat a future state's title to submerged lands by setting the submerged lands aside before statehood in a way that shows an intent to retain title.[16]

Footnotes

1 43 U.S.C.A. §§ 1301 to 1315.

2 43 U.S.C.A. § 1311.

3 Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977).
Under the Submerged Lands Act, submerged lands beneath the territorial sea and lands governed by the equal footing doctrine are presumptively granted to the states unless the United States has expressly retained the lands. U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
As to the equal footing principle, generally, see § 298.

4 U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977).

5 43 U.S.C.A. § 1301(a).
The definition of "lands beneath navigable waters" in the Act essentially confirms the states' equal footing rights to tidelands and submerged lands beneath inland navigable waters and also establishes the states' title to submerged lands beneath a three-mile belt of the territorial sea, which would otherwise be held by the United States. U.S. v. Alaska, 521 U.S. 1, 117 S. Ct. 1888, 138 L. Ed. 2d 231 (1997).
The definition of "lands" in the Act to mean navigable waters that fall within the Act's general grant to states as including all "made" lands that formerly were lands beneath navigable water does not apply to the gradual process by which sand accumulated along the shore although caused by a jetty. California ex rel. State Lands Com'n v. U. S., 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982), judgment entered, 459 U.S. 1, 103 S. Ct. 250, 74 L. Ed. 2d 1 (1982).

6 43 U.S.C.A. § 1301(f).

7 43 U.S.C.A. § 1311(d).

8 43 U.S.C.A. § 1311(e).

9 43 U.S.C.A. § 1313(a).

10 43 U.S.C.A. § 1313(b).

11 43 U.S.C.A. § 1313(c).

12 43 U.S.C.A. § 1315.

13 43 U.S.C.A. § 1314(a).

Under the doctrine of navigational servitude, the federal government may erect structures or otherwise modify a navigable stream without offering financial compensation to the state or to the owners of submerged land. Murphy v. Department of Natural Resources, 837 F. Supp. 1217 (S.D. Fla. 1993), aff'd, 56 F.3d 1389 (11th Cir. 1995).

14 43 U.S.C.A. § 1314(b).

15 Alaska v. U.S., 545 U.S. 75, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005), judgment entered, 546 U.S. 413, 126 S. Ct. 1014, 163 L. Ed. 2d 995 (2006).

16 Alaska v. U.S., 545 U.S. 75, 125 S. Ct. 2137, 162 L. Ed. 2d 57 (2005), judgment entered, 546 U.S. 413, 126 S. Ct. 1014, 163 L. Ed. 2d 995 (2006).

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A. Beds, Banks, and Shores

2. Ownership and Use

d. Ownership Between High- and Low-Water Marks

§ 303. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1458

The lands within the territorial limits of a state below ordinary high-water marks of navigable waters is the property of the state by virtue of its sovereignty.[1] Some states, however, have chosen to resign to riparian proprietors rights which properly belong to them[2] and hold that the title of the riparian owner extends to the low-water mark on tidewaters,[3] or on streams above tidewater,[4] or on navigable streams and waters generally.[5] Other states, however, retain full ownership of the submerged land and hold that the riparian owner's title extends only to the high-water mark in tidal waters or tidelands,[6] or in nontidal streams or waters,[7] or in navigable streams or waters generally.[8]

In the case of a river which is the boundary line between states, the State's title extends from the center of the channel to the river's high-water line in the state.[9]

CUMULATIVE SUPPLEMENT

Cases:

Statute governing interests of grantees in shore zones between high and low watermarks on a navigable lake or stream is construed in a manner to avoid an interpretation that would grant a gift to an upland owner, or a predecessor in interest, in violation of the anti-gift clause of state constitution. Const. Art. 10, § 18; NDCC 47–01–15. Reep v. State, 2013 ND 253, 841 N.W.2d 664 (N.D. 2013).

[END OF SUPPLEMENT]

Footnotes

1 State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922); Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 (1927).
The lands between the high and low tide marks and the water that periodically covers it passed to the state when it joined the union. Murphy v. Department of Natural Resources, 837 F. Supp. 1217 (S.D. Fla. 1993), aff'd, 56 F.3d 1389 (11th Cir. 1995).

2 Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960).

3 City of Boston v. Lecraw, 58 U.S. 426, 17 How. 426, 15 L. Ed. 118, 1854 WL 7527 (1854); State v. Leavitt, 105 Me. 76, 72 A. 875 (1909).
Under the law of Maine, Massachusetts, and Virginia, private property immediately adjacent to the ocean extends past the mean high-water demarcation to the mean low-water mark. McGarvey v. Whittredge, 2011 ME 97, 28 A.3d 620 (Me. 2011).
In Delaware, ownership of the foreshore is in the riparian owner. State ex rel. Buckson v. Pennsylvania R. Co., 228 A.2d 587 (Del. Super. Ct. 1967), judgment aff'd, 267 A.2d 455 (Del. 1969), opinion supplemented, 273 A.2d 268 (Del. 1971).

4 Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960); Hogue v. Bourgois, 71 N.W.2d 47, 54 A.L.R.2d 633 (N.D. 1955).

5 State v. Cockrell, 162 So. 2d 361 (La. Ct. App. 1st Cir. 1964), writ refused, 246 La. 343, 164 So. 2d 350 (1964); Reads Landing Campers Ass'n, Inc. v. Township of Pepin, 546 N.W.2d 10 (Minn. 1996).
A deed in the riparian landowners' chain of title which provided that property extended to the river indicated that their property extended to the low-water mark. Britton v. Department of Conservation, 2009 ME 60, 974 A.2d 303 (Me. 2009), as revised without opinion, (July 9, 2009).

6 City of Hoboken v. Pennsylvania R. Co., 124 U.S. 656, 8 S. Ct. 643, 31 L. Ed. 543 (1888); West v. Slick, 313 N.C. 33, 326 S.E.2d 601 (1985); State v. Hardee, 259 S.C. 535, 193 S.E.2d 497 (1972).
In Florida, the mean high-water line or mark is the ordinary boundary between private beachfront and state-owned land. Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).
Under New Hampshire law, private ownership of the land adjacent to the ocean extends only to the high-water mark. McGarvey v. Whittredge, 2011 ME 97, 28 A.3d 620 (Me. 2011).

7 Tyson v. State of Iowa, 283 F.2d 802 (8th Cir. 1960) (under Iowa law).

8 In re Sanders Beach, 143 Idaho 443, 147 P.3d 75 (2006); State v. Sorensen, 436 N.W.2d 358 (Iowa 1989); Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 240 A.2d 665 (1968); Doin v. Champlain Bluffs Development Corp., 68 A.D.3d 1605, 894 N.Y.S.2d 169 (3d Dep't 2009).
Swamp and overflowed lands do not extend beyond the ordinary high-water mark of navigable lakes or other bodies of navigable water. State Bd. of Trustees of Internal Imp. Trust Fund v. Laney, 399 So. 2d 408 (Fla. 3d DCA 1981).

9 State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), opinion supplemented, 108 Ariz. 258, 495 P.2d 1312 (1972), judgment rev'd on other grounds, 414 U.S. 313, 94 S. Ct. 517, 38 L. Ed. 2d 526 (1973) (overruled on other grounds by, Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977)) (Colorado River).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

2. Ownership and Use

d. Ownership Between High- and Low-Water Marks

§ 304. What constitutes high- or low-water mark

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1458

The "line of ordinary high water," which may serve as the boundary between property held by the state and riparian owners, is defined as the line to which the water rises in the seasons of ordinary high water or the line at which the presence of water is continued for such length of time as to mark upon the soil and vegetation a distinct character.[1] The term "ordinary high-water mark" has been defined to mean that line reached by water when the lake or stream is ordinarily full and the water ordinarily high.[2] With regard to tidelands, the "high-water line or mark" is the line or mark formed by the intersection of the tidal plane of mean (sometimes called "ordinary") high tide with the shore.[3]

The "low-water mark" of a river is defined as the point to which the river recedes at its low stage.[4]

Observation:

Where there is no official state survey indicating what the high-water mark is or that it is any different from a meander line established by an official United States survey, that meander line stands as the boundary line dividing swamp and overflowed lands from sovereignty lands.[5]

Footnotes

1 Diana Shooting Club v. Husting, 156 Wis. 261, 145 N.W. 816 (1914).
Under Washington law, the "high water line" for a river did not include its annual spring flood; the right of the State to the riverbed was limited to the line of ordinary high water and not to the line of highest water that could be proved. U.S. v. Pend Oreille Public Utility Dist. No. 1, 926 F.2d 1502 (9th Cir. 1991).

2 Rutten v. State, 93 N.W.2d 796 (N.D. 1958).

3 O'Neill v. State Highway Dept., 50 N.J. 307, 235 A.2d 1 (1967).

4 Conran v. Girvin, 341 S.W.2d 75 (Mo. 1960).

5 State Bd. of Trustees of Internal Imp. Trust Fund v. Laney, 399 So. 2d 408 (Fla. 3d DCA 1981).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

2. Ownership and Use

e. Character, Incidents, and Rights of Ownership; Protection and Enforcement of Rights

§ 305. Character and incidents of state ownership

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455, 1457, 1458, 1466

The State holds title to the lands lying beneath its navigable waters in trust for the use and benefit of the public.[1] Public trust easements exist over such property for navigation, commerce, and fishing.[2] Other protected uses in a state's tidelands may include the right to hunt, bathe, swim, use for boating and general recreation,[3] and the right to preservation of those lands in their natural state, so that they might serve as ecological units for scientific study, as open space and as environments providing food and habitat for birds and marine life and favorably affecting the scenery and climate of the area.[4]

Under the doctrine of state ownership in trust for the public, riparian proprietors are included among the beneficiaries and have a special property right independent of the general public, the enjoyment of which in no way conflicts with the exercise of legal ownership.[5] In this respect in addition to the public trust, there is a private trust associated with the submerged bottoms running in favor of the upland owners whose lands border the water.[6]

A state, as the owner of submerged land, may be granted the authority, by statute, to lease such property.[7]

Observation:

When land lying under nonnavigable tidal waters is vested in the state, a state may properly follow the rule that state ownership of those lands cannot be lost via adverse possession, laches, or any other equitable doctrine.[8]

CUMULATIVE SUPPLEMENT

Cases:

The state holds the navigable waterways in "public trust" for the benefit of state residents. Light v. State Water Resources Control Board, 226 Cal. App. 4th 1463, 173 Cal. Rptr. 3d 200 (1st Dist. 2014), as modified on denial of reh'g, (July 11, 2014).

[END OF SUPPLEMENT]

Footnotes

1 McGilvra v. Ross, 215 U.S. 70, 30 S. Ct. 27, 54 L. Ed. 95 (1909); Colberg, Inc. v. State ex rel. Dept. of Public Works, 67 Cal. 2d 408, 62 Cal. Rptr. 401, 432 P.2d 3 (1967); Orr v. Mortvedt, 735 N.W.2d 610 (Iowa 2007); R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).
To whatever extent a state is found to own a stream bed, the ownership is held in trust for the benefit of the general public. St. Lawrence Shores, Inc. v. State, 60 Misc. 2d 74, 302 N.Y.S.2d 606 (Ct. Cl. 1969).

2 Carstens v. California Coastal Com., 182 Cal. App. 3d 277, 227 Cal. Rptr. 135 (4th Dist. 1986).

3 Carstens v. California Coastal Com., 182 Cal. App. 3d 277, 227 Cal. Rptr. 135 (4th Dist. 1986).

4 Carstens v. California Coastal Com., 182 Cal. App. 3d 277, 227 Cal. Rptr. 135 (4th Dist. 1986).

5 Mobile Transp. Co. v. City of Mobile, 153 Ala. 409, 44 So. 976 (1907).

6 Treuting v. Bridge and Park Commission of City of Biloxi, 199 So. 2d 627 (Miss. 1967).

7 Britton v. Donnell, 2011 ME 16, 12 A.3d 39 (Me. 2011).

8 Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 108 S. Ct. 791, 98 L. Ed. 2d 877 (1988).

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A. Beds, Banks, and Shores

2. Ownership and Use

e. Character, Incidents, and Rights of Ownership; Protection and Enforcement of Rights

§ 306. Character and incidents of private ownership

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455, 1457, 1458, 1466

Where tidelands and lands under navigable waters have been conveyed into private ownership, an owner generally holds title subject to public trust restraints.[1] The title of a riparian owner in the submerged lands adjoining the owner's upland which borders on a public navigable stream or body of water is a qualified title, held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation or in the interests of commerce.[2]

A riparian owner, in the exercise of his or her right to use the river bed between high- and low-water marks, must so exercise it as not to interfere with the rights of other riparian owners.[3] Similarly, although littoral owners may use the waters adjacent to their shorefront property for a panoply of recreational activities, their use is governed by a rule of reasonableness and must be restricted so as not to interfere with the correlative rights of other littoral owners.[4]

Footnotes

1 San Diego County Archaeological Society, Inc. v. Compadres, 81 Cal. App. 3d 923, 146 Cal. Rptr. 786 (4th Dist. 1978) (disapproved of on other grounds by, City of Los Angeles v. Venice Peninsula Properties, 31 Cal. 3d 288, 182 Cal. Rptr. 599, 644 P.2d 792 (1982)).

Riparian ownership to the center of a stream does not necessarily prevent the State's use of the waters for the purposes for which they are adaptable for the equal benefit of all members of the public. Day v. Armstrong, 362 P.2d 137 (Wyo. 1961).

2 U.S. v. Cress, 243 U.S. 316, 37 S. Ct. 380, 61 L. Ed. 746 (1917); R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).

As to the public right of navigation in general, see § 163.

3 Freeland v. Pennsylvania R. Co., 197 Pa. 529, 47 A. 745 (1901).

4 Heston v. Ousler, 119 N.H. 58, 398 A.2d 536, 14 A.L.R.4th 1021 (1979).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

2. Ownership and Use

e. Character, Incidents, and Rights of Ownership; Protection and Enforcement of Rights

§ 307. Rights in, and use of, shores

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1455, 1458

A.L.R. Library

Implied acceptance, by public use, of dedication of beach or shoreline adjoining public waters, 24 A.L.R.4th 294
Validity of local beachfront zoning regulations designed to exclude recreational uses by persons other than beachfront residents, 18 A.L.R.4th 568
Right of public in shore of inland navigable lake between high- and low-water marks, 40 A.L.R.3d 776

Where the fee of the shore on tidewater between high- and low-water mark is in the state as trustee for the public, a riparian proprietor whose land borders upon the tidewater has a right in the nature of a franchise or easement in the shore between high- and low-water mark.[1] The rule in some jurisdictions is that the riparian proprietor has the exclusive right, during times of low water, to the use of the land between high- and low-water marks,[2] and the only substantial public right in land between the high- and low-water mark which is paramount to that of the riparian owner is that of the free and unobstructed use of navigable water for navigation.[3] In other cases, a riparian owner's use of the land between the high- and low-water mark is subordinate to, and must not interfere with, the public rights of navigation, fishery, and the improvement of the stream.[4]

Footnotes

1 State v. Knowles-Lombard Co., 122 Conn. 263, 188 A. 275, 107 A.L.R. 1344 (1936).

2 Stewart v. Turney, 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960 (1923).

3 Town of Orange v. Resnick, 94 Conn. 573, 109 A. 864, 10 A.L.R. 1046 (1920).

4 U.S. v. Willow River Power Co., 324 U.S. 499, 65 S. Ct. 761, 89 L. Ed. 1101 (1945).
As to the right of the public to the use of shores of inland navigable lakes, generally, see § 131.

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e. Character, Incidents, and Rights of Ownership; Protection and Enforcement of Rights

§ 308. Taking or removing of sand or other materials

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1457, 1466

Where the title to the bed of a navigable stream or other body of water is in the state, the general rule is that no person has the right as against the State to take or appropriate sand, gravel, phosphates, or similar material without the consent or license of the state.[1] The State may ordinarily grant the privilege to take such materials on such terms as it sees fit.[2] On the other hand, a state department may not have the authority under state law to require a company which has removed spoil material from a river, to obtain a permit, and to pay for the spoil removed where the company's dredging operations were both necessary and incidental to navigation and were done pursuant to a permit from the United States Army Corps of Engineers.[3]

Where the fee to the soil between high- and low-water marks is in the abutting owner, subject to the right of the public to use or reclaim it for public purposes, the owner has the right, during the periods of recession of the water, to take ore from this space provided the State does not require it for public purposes and provided the owner does not measurably interfere with the use of it for such prospective uses.[4]

Footnotes

1 Wear v. State of Kansas ex rel. Brewster, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917).

2 Wear v. State of Kansas ex rel. Brewster, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917); State v. Black Bros., 116 Tex. 615, 297 S.W. 213, 53 A.L.R. 1181 (1927).

3 Amdel Pipeline, Inc. v. State, 541 S.W.2d 821 (Tex. 1976).

4 State v. Korrer, 127 Minn. 60, 148 N.W. 617 (1914), opinion supplemented, 127 Minn. 60, 148 N.W. 1095 (1914).

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§ 309. Erection and maintenance of structures

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1457, 1460

Forms

Am. Jur. Legal Forms 2d § 260:86 (Agreement—To grant right to erect breakwater)
Am. Jur. Legal Forms 2d § 260:87 (Agreement—To sell land for construction of seawall)
Am. Jur. Legal Forms 2d § 260:88 (Provision in deed—Granting right to construct bulkhead)

Ordinarily, where a riparian proprietor has title to the shore or bed of a stream or body of water, he or she has the right to erect and maintain structures thereon,[1] subject to the condition that such structures must not materially interfere with the public right of navigation[2] or with the rights of other persons in respect to the use of the stream or waters.[3] Riparian proprietors thus may erect and maintain structures in aid of navigation[4] or for the protection of their property against erosion.[5] Furthermore, the owner of the land on both sides of a nonnavigable stream may maintain a fence across it.[6] A pier placed in navigable water by a nonriparian landowner may be considered a lawful structure if such landowner has been granted an easement by the owner of the riparian land and certain statutory conditions are met.[7]

The right to erect and maintain structures upon land underlying waters may be restricted in a grant of such land.[8] Where the title to the land is vested in the state, a riparian proprietor has no right to erect a permanent structure thereon without public authorization.[9]

In constructing a structure on the bed of a body of water, one must use due care that the property of other persons will not be endangered or injured thereby,[10] and one who wrongfully or negligently places or maintains a structure in a stream or body of water may be liable for any injury proximately resulting therefrom to the persons or property of others.[11]

Observation:

The test for determining the legality of a dock or other structure that constitutes a riparian use of the waters of a nonnavigable lake whose bed is owned in common by littoral owners is whether the structure is reasonable.[12]

CUMULATIVE SUPPLEMENT

Cases:

Under North Carolina law, town had no authority to declare a structure to be a public nuisance solely because it was located on the dry-sand beach. Sansotta v. Town of Nags Head, 97 F. Supp. 3d 713 (E.D. N.C. 2014).

[END OF SUPPLEMENT]

Footnotes

1 City of Boston v. Lecraw, 58 U.S. 426, 17 How. 426, 15 L. Ed. 118, 1854 WL 7527 (1854); Mandes v. Godiksen, 57 Conn. App. 79, 747 A.2d 47 (2000).

2 Fox River Paper Co. v. Railroad Com'n of Wisconsin, 274 U.S. 651, 47 S. Ct. 669, 71 L. Ed. 1279 (1927); City of Boston v. Lecraw, 58 U.S. 426, 17 How. 426, 15 L. Ed. 118, 1854 WL 7527 (1854); Mandes v. Godiksen, 57 Conn. App. 79, 747 A.2d 47 (2000); R.W. Docks & Slips v. State, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781 (2001).

3 Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 (1927).
Riparian owners may build a pier within the extension of their shore boundaries only so far out as not to interfere with the use of the lake by others or with the rights of other riparian owners. Bath v. Courts, 459 N.E.2d 72 (Ind. Ct. App. 1984).
A state's coastal resources commission improperly granted a permit authorizing the extension of an existing pier and the construction of docking facilities on a pier in public trust waters where there were uncontradicted reports of state and federal agencies and opposition of area residents pertaining to ecological and environmental concerns and interference with public access and use and where the only support in the

record for the permit related to the permittee's convenience. Ballance v. North Carolina Coastal Resources Com'n, 108 N.C. App. 288, 423 S.E.2d 815 (1992).

4 Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969 (1923).

As to the construction and maintenance of wharves, generally, see Am. Jur. 2d, Wharves §§ 3 to 10.

5 Doemel v. Jantz, 180 Wis. 225, 193 N.W. 393, 31 A.L.R. 969 (1923).

6 Griffith v. Holman, 23 Wash. 347, 63 P. 239 (1900).

7 Konneker v. Romano, 2010 WI 65, 326 Wis. 2d 268, 785 N.W.2d 432 (2010).

8 People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916).

9 Montgomery v. City of Portland, 190 U.S. 89, 23 S. Ct. 735, 47 L. Ed. 965 (1903); City of Oakland v. E.K. Wood Lumber Co., 211 Cal. 16, 292 P. 1076, 80 A.L.R. 379 (1930).

Landowners were required to obtain a permit to erect a bulkhead on their shore where the bulkhead was within a certain distance of regulated wetlands. Papadopoulos v. Jorling, 151 A.D.2d 764, 543 N.Y.S.2d 135 (2d Dep't 1989).

10 Williams v. Columbus Producing Co., 80 W. Va. 683, 93 S.E. 809 (1917).

11 Williams v. Columbus Producing Co., 80 W. Va. 683, 93 S.E. 809 (1917).

12 Hefferline v. Langkow, 15 Wash. App. 896, 552 P.2d 1079 (Div. 1 1976).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

2. Ownership and Use

e. Character, Incidents, and Rights of Ownership; Protection and Enforcement of Rights

§ 310. Remedies and actions for protection and enforcement of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1470 to 1488

The usual remedies are available for the protection and enforcement of rights with respect to submerged lands.[1] One whose rights in such lands are wrongfully injured thus may maintain an action for damages[2] or, in the case of a continuing or threatened injury, an action for an injunction.[3] An action to quiet title may also be maintained in a proper case.[4]

Private individuals cannot complain of a purpresture consisting of the erection of a dam across tidal water, which has been granted by the State to an individual by whose land it is entirely surrounded.[5]

Observation:

A bill of complaint alleging only that the plaintiff owns the land beneath a body of water and that adjacent landowners committed acts of trespass by affixing piers to the plaintiff's submerged land fails to put the ownership of the waters at issue or to allege a trespass to those waters, precluding the determination of the ownership of such waters and the imposition of a remedy regarding the use of such waters, even though the pleadings include a prayer for general relief.[6]

Footnotes

1 Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 (1927).

2 Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938).

3 Appleby v. City of New York, 271 U.S. 364, 46 S. Ct. 569, 70 L. Ed. 992 (1926).
Purported landowners were entitled to a preliminary injunction to prevent the commencement of the construction of a boardwalk on disputed tideland where the proposed pathway would have been in place and construction completed before any other litigation could have been resolved, the developer would not have been harmed by the grant of the injunction, and it was in the public's interest to refrain from altering the natural habitat. Secretary of State v. Gunn, 75 So. 3d 1015 (Miss. 2011).

4 U.S. v. State of Utah, 283 U.S. 64, 51 S. Ct. 438, 75 L. Ed. 844 (1931).

5 Bolsa Land Co. v. Burdick, 151 Cal. 254, 90 P. 532 (1907).

6 Jenkins v. Bay House Associates, L.P., 266 Va. 39, 581 S.E.2d 510 (2003).

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2. Ownership and Use

f. Boundaries or Apportionment as Between Riparian and Littoral Owners

§ 311. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1464

The boundaries of submerged lands do not necessarily extend according to the boundary lines of the uplands, or at right angles with the shoreline, and various methods have been applied for determining the division or boundaries of property and rights between riparian or littoral proprietors.[1] Under one method, in determining the respective riparian areas between two contiguous shoreline properties, if the boundary lines on land are not at right angles with the shore, but approach the shore at obtuse or acute angles, the division lines should be drawn in a straight line at a right angle to the shoreline without respect to the onshore boundaries.[2] Another method provides that where the shoreline is irregular, the boundary line should be run in such a way as to divide the total navigable waterfront in proportion to the length of the actual shorelines of each owner taken according to the general trend of the shore.[3]

The proper method for determining riparian boundaries is to be determined based upon what is fair and equitable under the circumstances.[4] Furthermore, any method or rule for apportionment or division is subject to such modification as may be necessary to allow each riparian owner to have his or her due proportion of the line bounding navigability and a course of access to it from the shore exclusive of every other owner.[5]

A court of equity is the proper tribunal to make an apportionment and to determine the boundaries between coterminous riparian property owners.[6]

Footnotes

1 Freed v. Miami Beach Pier Corporation, 93 Fla. 888, 112 So. 841, 52 A.L.R. 1177 (1927).

2 Manlick v. Loppnow, 2011 WI App 132, 337 Wis. 2d 92, 804 N.W.2d 712 (Ct. App. 2011).

3 Manlick v. Loppnow, 2011 WI App 132, 337 Wis. 2d 92, 804 N.W.2d 712 (Ct. App. 2011).

4 Manlick v. Loppnow, 2011 WI App 132, 337 Wis. 2d 92, 804 N.W.2d 712 (Ct. App. 2011).
A slight angle in the shoreline where the landowners' and their neighbors' property line met the shore did not require equitable considerations to avoid an unjust result when considering the littoral boundary line between the properties; rather, the boundary could be determined by a line drawn into the water perpendicular to the shoreline. Kendall v. Walker, 181 Cal. App. 4th 584, 104 Cal. Rptr. 3d 262 (1st Dist. 2009), as modified without opinion on denial of reh'g, (Jan. 27, 2010).

5 Manlick v. Loppnow, 2011 WI App 132, 337 Wis. 2d 92, 804 N.W.2d 712 (Ct. App. 2011).

6 Cordovana v. Vipond, 198 Va. 353, 94 S.E.2d 295, 65 A.L.R.2d 138 (1956).
As to the apportionment of additions to lands by accretion or reliction, see §§ 339 to 342.

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§ 312. Lands abutting on river or stream

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1464, 1465

A.L.R. Library

Apportionment and division of area of river as between riparian tracts fronting on same bank, in absence of agreement or specification, 65 A.L.R.2d 143

Generally, in apportioning and dividing the bed of a river or the riparian rights areas in the river, as between two or more riparian tracts fronting on the same bank, in the absence of an agreement, specification, or statute, or other definitely controlling factor, a court should apportion and divide the area equitably in such a way that each of the riparian tracts will be assigned an extended frontage in the river based on and generally proportionate to the length of such tract's frontage along the riverbank or shore.[1] In the apportionment of appurtenant areas of the river from the shore out to or toward the thread, it is the extent of the individual riparian tract's frontage on the riverbank or shore which controls the apportionment of the area in the river, rather than such riparian tract's depth, area, or configuration, or the direction in which its upland sidelines run.[2] Further, where the thread of a stream, being the deepest grove or trench in the bed of a river channel,[3] or the last part of the bed to run dry,[4] is the boundary between estates and the stream has two channels, the thread of the main channel is the boundary between the estates.[5]

Division lines of riparian rights areas in a river are sometimes fixed by and rest upon circumstances involving acquiescence, estoppel, or adverse possession.[6] Also, the manner in which riparian rights areas in a river should be apportioned and division lines fixed as between two or more riparian tracts lying along the same bank or shore of the river may be governed by the provisions of local statutes or ordinances existing in the particular jurisdiction.[7]

Footnotes

1 Cordovana v. Vipond, 198 Va. 353, 94 S.E.2d 295, 65 A.L.R.2d 138 (1956).
As to a river boundary between states, generally, see Am. Jur. 2d, States, Territories, and Dependencies §§ 30, 31.

2 Cordovana v. Vipond, 198 Va. 353, 94 S.E.2d 295, 65 A.L.R.2d 138 (1956).

3 Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011).

4 Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011).

5 Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

6 Mayor and City Council of Baltimore v. Crown Cork & Seal Co., 122 F.2d 385 (C.C.A. 4th Cir. 1941).

7 Mayor and City Council of Baltimore v. Crown Cork & Seal Co., 122 F.2d 385 (C.C.A. 4th Cir. 1941); Martin v. Standard Oil Co. of N.J., 198 F.2d 523 (D.C. Cir. 1952); Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957).

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§ 313. Flats or tidelands

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1464

As to the division or apportionment of flats or tidelands, various methods, adapted to different conditions, have been followed, with the aim of securing to each riparian or littoral proprietor a share proportional to his or her line on the margin and in front of or adjacent to the upland.[1] One method is to draw a base line between the two corners of each lot where they strike the shore and from these corners extend parallel lines perpendicular to the base line to the low-water mark, and if the shoreline is straight, the lines thus extended will be the boundaries of each lot.[2] If the shoreline is curved, either regularly or irregularly, so that the lines of adjoining lots extended diverge from or interfere with each other, the triangular parcels thrown out or included thereby must be equally divided between the adjoining proprietors.[3] In dividing flats in a cove in which there is no natural channel and which is entirely above the low-water mark, the procedure is to run a line across the mouth of the cove, to which lines should be drawn from the corners, at the high-water mark, of the lands of the proprietors abutting on the cove in such a way as to make the sections on the straight line proportional to the respective frontages on the water line.[4]

Footnotes

1 Hayes v. Bowman, 91 So. 2d 795 (Fla. 1957) (no absolute rule to fit all situations can be formulated); Spath v. Larsen, 20 Wash. 2d 500, 148 P.2d 834 (1944).

2 Oregon Coal & Navigation Co. v. Anderson, 206 F. 404 (C.C.A. 9th Cir. 1913).

3 Emerson v. Taylor, 9 Me. 42, 1832 WL 518 (1832).

4 Tappan v. Boston Water-Power Co., 157 Mass. 24, 31 N.E. 703 (1892).

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§ 314. Land abutting on lake or pond

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1464, 1465

A.L.R. Library

Allocation of water space among lakefront owners, in absence of agreement or specification, 14 A.L.R.4th 1028

In cases where the littoral proprietors own the bed of a natural lake or pond, they are ordinarily deemed to take title ratably,[1] and the manner in which the boundary lines run over the bed of the lake is dependent to a great extent upon the form, length, breadth, and configuration of the lake.[2] Where the shores of the lake are comparatively even and round, the boundary lines may be drawn from the shore to the center of the body of water.[3] Where the lake is long and comparatively narrow and regular in outline, instead of drawing lines to its center, a median line may be established which may be treated as the thread of the lake although it in fact has no outlet or current, and the rules applicable to the drawing of boundaries dividing the beds of nonnavigable streams between adjacent owners of the upland may be applied.[4] In such a case, the side lines are to be governed by the course of the stream or the median line of the lake, and the submerged land is bounded by lines drawn at right angles with the central thread rather than at right angles with the shore at the point of departure.[5] In cases where the irregularity of shape prevents the drawing of the divisional lines to a common center or to a median line, the lines will be run in such a way as to give each upland owner an area in proportion to the length of the shore frontage.[6] Moreover, where the shoreline approximates a straight line and the onshore property boundaries are perpendicular or at right angles to the shore, the boundaries are determined by extending the

onshore boundaries into the lake.[7] However, in at least some jurisdictions, riparian boundaries cannot be extended to the middle of a lake where the State holds all public fresh water lakes in trust for the use of all its citizens.[8]

Footnotes

1 Rice v. Naimish, 8 Mich. App. 698, 155 N.W.2d 370 (1967).
As to the ownership of lakes and ponds and their beds, see §§ 121, 122, 123, 127, 128.

2 Rice v. Naimish, 8 Mich. App. 698, 155 N.W.2d 370 (1967).

3 Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930).
With respect to a circular lake, the boundary lines are drawn from the ends of the littoral owners' respective meander lines to a point in the center of the lake. Mesenbrink v. Hosterman, 147 Idaho 408, 210 P.3d 516 (2009).

4 Stewart v. Turney, 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960 (1923).
If a lake is oblong, boundary lines are drawn by dividing the lake bed similar to a river along its sides with converging lines only required at its two ends. Mesenbrink v. Hosterman, 147 Idaho 408, 210 P.3d 516 (2009).

5 Stewart v. Turney, 237 N.Y. 117, 142 N.E. 437, 31 A.L.R. 960 (1923).

6 Hilleary v. Meyer, 91 Idaho 775, 430 P.2d 666 (1967); Borsellino v. Kole, 168 Wis. 2d 611, 484 N.W.2d 564 (Ct. App. 1992) (extended lot line method).

7 Bath v. Courts, 459 N.E.2d 72 (Ind. Ct. App. 1984); Manlick v. Loppnow, 2011 WI App 132, 337 Wis. 2d 92, 804 N.W.2d 712 (Ct. App. 2011).

8 Bath v. Courts, 459 N.E.2d 72 (Ind. Ct. App. 1984).

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(1) In General

§ 315. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1468

Forms

Am. Jur. Legal Forms 2d § 260:37 (Deed—Granting lake and lake bed)

Proprietary rights and interests in submerged lands may be transferred, and generally such lands may be sold and conveyed separately from the adjoining uplands or reserved in a grant of the uplands.[1] The rights of a riparian owner with respect to the use of the shore of tidewaters are likewise separable and alienable in the same manner as other property.[2]

To obtain title to submerged lands under one state statute, which permitted upland riparian owners to obtain title to permanently improved submerged lands, a riparian owner needed to either build wharves, fill in submerged land and erect permanent buildings upon the fill, or, at the very least, erect permanent structures on the underwater property.[3]

Footnotes

1 Axline v. Shaw, 35 Fla. 305, 17 So. 411 (1895).

2 State v. Knowles-Lombard Co., 122 Conn. 263, 188 A. 275, 107 A.L.R. 1344 (1936).

3 City of West Palm Beach v. Board of Trustees of the Internal Improvement Trust Fund, 746 So. 2d 1085 (Fla. 1999) (holding that a city's dredging of submerged bottomlands did not "permanently improve" such lands).

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(1) In General

§ 316. Title as passing with grant or conveyance of upland

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1468

In jurisdictions where submerged or flowed lands may be held in private ownership, the question whether the title to such lands will pass under a conveyance or grant of the adjoining uplands usually depends upon the intention of the grantor[1] as indicated by the language of the grant.[2] In the case of private grants, generally, in the absence of an explicit reservation, a grant of land on the shore of a body of water will be held to include the adjoining underwater land except in unusual cases where the nature of the grant itself shows a contrary intention.[3] However, where the state or the federal government holds the title to lands underlying navigable waters in its sovereign capacity, in trust for the public, the title to such lands will generally not pass under a grant of the adjoining uplands in the absence of language clearly indicating an intention to that effect.[4]

Where the United States owns the bed of a nonnavigable stream and the upland of one or both sides, it is free, when disposing of the upland, to retain all or any part of the bed of the stream, and whether, in any particular instance, it has done so is essentially a question of what it intended.[5] If its intention is not otherwise shown, it will be taken to have assented that its conveyance should be construed according to the law of the state in which the land lies.[6] Grants by the United States of land adjoining a nonnavigable stream or body of water do not convey the land under water where, under the state law, riparian owners take title only to the water's edge.[7] The legal principles which determine riparian rights under conveyances from the United States, which owns the bed of a nonnavigable stream and the upland, apply where the United States is disposing of tribal lands of Native Americans under its guardianship.[8]

Footnotes

1 U.S. v. State of Oregon, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935).

2 § 317.

3 Knapp v. Hughes, 19 N.Y.3d 672, 957 N.Y.S.2d 640, 981 N.E.2d 236 (2012).

4 Am. Jur. 2d, Boundaries § 27.

5 U.S. v. State of Oregon, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935).

6 U.S. v. State of Oregon, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935).

7 Marshall Dental Mfg. Co. v. State of Iowa, 226 U.S. 460, 33 S. Ct. 168, 57 L. Ed. 300 (1913).

8 State of Oklahoma v. State of Texas, 258 U.S. 574, 42 S. Ct. 406, 66 L. Ed. 771 (1922).

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(1) In General

§ 317. Construction, operation, and effect of grants and reservations; incidental rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1468

The construction, operation, and effect of grants and reservations of submerged lands or of rights therein, as in the case of lands generally,[1] depend primarily upon the intention of the parties[2] as expressed in the instrument of conveyance.[3] The intention of the parties also may be indicated by a practical construction of the grant by the parties.[4] Public grants of submerged lands or of rights therein are usually construed strictly as against the grantee.[5]

The rule in some jurisdictions is that state grants of land below the high-water mark are of the estate in the lands, and not merely of a franchise or incorporeal hereditament, and operate to transfer or extinguish every previous right of the state therein except such sovereign right as it may lawfully exercise over other private property.[6] An unrestricted grant of public lands under navigable waters has in some instances been held to be an unqualified grant of the fee and not subject to any easement in favor of the public.[7] In other jurisdictions, a state grant of tidelands gives the grantee no rights of any sort beyond the boundaries of the grant.[8]

The rights of grantees of tidelands are not affected by their failure to fill in the lots granted where they did not covenant to do so and the grantor never required the filling of streets located upon the property, the duty to fill arising only when the filling was required.[9]

Footnotes

1 As to the construction, operation, and effect of grants and reservations, generally, see Am. Jur. 2d, Deeds §§ 192 to 269.

2 § 316.

3 Spreckels v. Brown, 212 U.S. 208, 29 S. Ct. 256, 53 L. Ed. 476 (1909); Brant Lake Shores, Inc. v. Barton, 61 Misc. 2d 902, 307 N.Y.S.2d 1005 (Sup 1970).

Where a party seized of land submerged to the center of a pond expressly excluded the submerged land by use of a more specific legal description in a subsequent conveyance, he remained the owner of the submerged property. Hartwood Syndicate, Inc. v. Passaic Valley Council, 80 A.D.2d 871, 437 N.Y.S.2d 16 (2d Dep't 1981).

The conveyance of title to landowners of property adjacent to a pond did not show the grantor's intention to withhold the underwater lands from the grant where the deed did not expressly exclude the underwater lands. Knapp v. Hughes, 19 N.Y.3d 672, 957 N.Y.S.2d 640, 981 N.E.2d 236 (2012).

As to the effect of meander lines, generally, see Am. Jur. 2d, Boundaries §§ 23 to 26.

As to the construction of public grants of lands bordering navigable waters, generally, see Am. Jur. 2d, Public Lands § 21.

4 U.S. v. State of Oregon, 295 U.S. 1, 55 S. Ct. 610, 79 L. Ed. 1267 (1935).

5 Hollan v. State, 308 S.W.2d 122 (Tex. Civ. App. Fort Worth 1957), writ refused n.r.e.

6 City of Hoboken v. Pennsylvania R. Co., 124 U.S. 656, 8 S. Ct. 643, 31 L. Ed. 543 (1888).

7 People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916).

8 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921) (applying law of Washington).

9 Appleby v. City of New York, 271 U.S. 364, 46 S. Ct. 569, 70 L. Ed. 992 (1926).

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(2) Public Grants of Land or of Rights Therein

§ 318. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1468

The states have the power to grant land under navigable waters and tidelands to private ownership or leasehold.[1] There, however, is no universal and uniform law on the subject, and each state has dealt with the lands under navigable waters within its borders according to its own views of justice and policy.[2]

The power of the State to dispose of subaqueous lands which it holds in its sovereign capacity, or to grant rights therein, is subject to those provisions of the Federal Constitution giving Congress control of the waters on which foreign and interstate navigation is conducted[3] and to constitutional restrictions upon interference with vested rights.[4] The power of the state with respect to such disposition or grants also is subject to the rights of the public to the use of the waters for navigation, fishing, and the like.[5] However, the right of the State to convey the title to submerged lands free from any public easement in the superjacent waters has been upheld in some cases.[6] In some jurisdictions, the right of a state to grant or dispose of lands under navigable waters is limited or restricted by specific state constitutional provision.[7]

Subject to such noted qualifications and limitations, a state may, generally, for every purpose which may be useful, convenient, or necessary to the public, make or authorize the making of grants in fee or conditionally for the beneficial use of the grantee or to promote commerce.[8] Grants to the owners of the adjoining uplands, either for beneficial enjoyment or for commercial purposes, have been authorized and recognized as one of the uses to which the State may lawfully apply such lands.[9] The contemplated use, however, must be reasonable and one which can fairly be said to be for the public benefit or not injurious to the public.[10]

The states cannot abdicate general control over such lands, since such abdication would be inconsistent with the implied legal duty of the states to preserve and control such lands and the waters thereon and the use of them, for the public good.[11]

Observation:

State statutes purporting to convey tidelands free of the public trusts are to be strictly construed, since an intent to abandon the public trust must be clearly expressed or necessarily implied, and if any interpretation of the statute is reasonably possible which would retain the public's interest in tidelands, the court must give the statute such an interpretation.[12] Similarly, unless a statute entitling the owners of land on navigable water to take title to submerged lands for a specific purpose, clearly and specifically states otherwise, its terms are to be construed so as to cause no interference with the public's dominant trust rights, for the presumption is that the sovereign does not intend to alienate such rights to the submerged lands when it grants such land.[13]

Footnotes

1 Donnelly v. U.S., 228 U.S. 243, 33 S. Ct. 449, 57 L. Ed. 820 (1913); Graf v. San Diego Unified Port Dist., 7 Cal. App. 4th 1224, 9 Cal. Rptr. 2d 530 (4th Dist. 1992).
Private owners can have an interest in submerged tidal lands through riparian grants, which are conveyances by the state of tidally flowed lands to a private owner. City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 4 A.3d 542 (2010).

2 U.S. v. Mission Rock Co., 189 U.S. 391, 23 S. Ct. 606, 47 L. Ed. 865 (1903); Treuting v. Bridge and Park Commission of City of Biloxi, 199 So. 2d 627 (Miss. 1967).

3 State v. City of Tampa, 88 Fla. 196, 102 So. 336 (1924).

4 State v. Black Bros., 116 Tex. 615, 297 S.W. 213, 53 A.L.R. 1181 (1927).

5 State of New Jersey v. State of Delaware, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847 (1934).
A conveyance of tidelands by a state does not convey title free of the public trust for navigation, commerce, fishing, the right to hunt, bathe or swim, and the right to preserve the tidelands in their natural state as ecological units for scientific study. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).
Although the State may convey legal title to submerged lands to private owners, any rights thus conveyed are always subject to the State's overriding obligation to protect the public rights of swimming, bathing, fishing, and navigation. Mildenberger v. U.S., 91 Fed. Cl. 217 (2010), aff'd in part, 643 F.3d 938 (Fed. Cir. 2011).

6 People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916).
Tideland properties conveyed by the State that were subsequently filled, whether or not they have been substantially improved, are free of the public trust to the extent the areas of such parcels are not subject to tidal action. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).

7 San Pedro, L.A. & S.L.R. Co. v. Hamilton, 161 Cal. 610, 119 P. 1073 (1911).

8 State of New Jersey v. State of Delaware, 291 U.S. 361, 54 S. Ct. 407, 78 L. Ed. 847 (1934).

9 People v. Steeplechase Park Co., 218 N.Y. 459, 113 N.E. 521 (1916).

10 Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892).

11 Long Sault Development Co. v. Kennedy, 212 N.Y. 1, 105 N.E. 849 (1914).

A state, as administrator of the trust in tidelands on behalf of the public, does not have the power to abdicate its role as trustee in favor of private parties. City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).

12 City of Berkeley v. Superior Court, 26 Cal. 3d 515, 162 Cal. Rptr. 327, 606 P.2d 362 (1980).

13 RJR Technical Co. v. Pratt, 339 N.C. 588, 453 S.E.2d 147 (1995).

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2. Ownership and Use

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(2) Public Grants of Land or of Rights Therein

§ 319. By federal government

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1468

Although there is early authority to the effect that the United States has no power to convey the title to the soil below the high-water mark of a navigable stream within a territory prior to its admission to the Union,[1] the United States Supreme Court has spoken of expressions to that effect by it as dicta and not strictly true, and expressly recognizes a power in Congress to make grants of this character where it becomes necessary to do so in order to perform international obligations, or to effect the improvement for the purposes of commerce, or to carry out other appropriate public purposes.[2] According to some of the state courts, prior to the admission of a state into the union, Congress has the power to grant tideland lying between high- and low-water marks within its boundaries,[3] and patentees from the federal government have title to the land covered by the navigable nontidal waters within the calls of their patents.[4] However, title passes to the state upon its admission to the union where Congress' intention to defeat a state's claim to the title of a bed of navigable water is not clearly expressed in a statute, or Congress' intent to ratify a federal claim to the navigable bed is not clearly demonstrated.[5] Thus, disposals by the United States of lands under navigable waters within the limits of a territory are not to be lightly inferred and should not be regarded as intended unless the intention is definitely declared or otherwise made very plain.[6] Further, the conveyance by the United States of any right to the bed of navigable waters will not be inferred from a silent document, absent extraordinary countervailing circumstances.[7]

A patent from the United States to lands adjoining a navigable stream or body of water extends only to the high-water mark and does not affect the title of the state to the land below the high-water mark.[8] The federal government may not grant rights to tidelands within a state which will interfere with the rights of littoral owners.[9]

Practice Tip:

A court deciding a question of title to the bed of a navigable water must begin with a strong presumption against conveyance by the United States and must not infer such a conveyance unless the intention was definitely declared or otherwise made plain, or was rendered in clear and special words, or unless the claim confirmed in terms embraces the land under the waters of the stream.[10]

Observation:

A state's public trust easement, which applies to all land which were tidelands upon the state's entry into the union, irrespective of the present character of the land, which gives the state an overriding control over the property, but which allows the landowner to retain legal title subject to the state's public trust easement, cannot survive earlier patent proceedings conducted pursuant to a congressional act implementing a treaty and confirming title to the original Mexican grantees.[11]

Footnotes

1 Pollard v. Hagan, 44 U.S. 212, 3 How. 212, 11 L. Ed. 565, 1845 WL 6003 (1845); Illinois Steel Co. v. Bilot, 109 Wis. 418, 85 N.W. 402 (1901).

2 Brewer-Elliott Oil & Gas Co. v. U.S., 260 U.S. 77, 43 S. Ct. 60, 67 L. Ed. 140 (1922).

3 Kneeland v. Korter, 40 Wash. 359, 82 P. 608 (1905).

4 Hewitt-Lea Lumber Co. v. King County, 113 Wash. 431, 194 P. 377, 21 A.L.R. 201 (1920).

5 Utah Div. of State Lands v. U.S., 482 U.S. 193, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987).

6 U.S. v. Holt State Bank, 270 U.S. 49, 46 S. Ct. 197, 70 L. Ed. 465 (1926).

7 Hanes v. State, 1998 OK CR 74, 973 P.2d 330 (Okla. Crim. App. 1998), as corrected, (Feb. 22, 1999).

8 Borax Consolidated v. City of Los Angeles, 296 U.S. 10, 56 S. Ct. 23, 80 L. Ed. 9 (1935).

9 San Francisco Sav. Union v. R.G.R. Petroleum & Mining Co., 144 Cal. 134, 77 P. 823 (1904).

10 Montana v. U. S., 450 U.S. 544, 101 S. Ct. 1245, 67 L. Ed. 2d 493 (1981) (the mere fact that the bed of a navigable water lies within the boundaries described in a treaty establishing an Indian reservation does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance).

11 Summa Corp. v. California ex rel. State Lands Com'n, 466 U.S. 198, 104 S. Ct. 1751, 80 L. Ed. 2d 237 (1984).

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§ 320. To whom grant may be made; right to obtain grant

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1468

In the absence of any statutory restriction, public grants of subaqueous lands, or of rights therein, may be made to persons other than the owner of the adjacent upland.[1] A state may grant title to tide and submerged lands bordering the shoreline to a municipal corporation,[2] and a state may sell submerged lands to a governmental park commission.[3] It has also been held, however, that the right conferred by statute on the owner of upland, to obtain from the state land commissioners a grant of adjacent lands under water, cannot exist severed from the ownership of the upland.[4]

Footnotes

1 City of Hoboken v. Pennsylvania R. Co., 124 U.S. 656, 8 S. Ct. 643, 31 L. Ed. 543 (1888).

2 Am. Jur. 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 476.

3 Treuting v. Bridge and Park Commission of City of Biloxi, 199 So. 2d 627 (Miss. 1967).

4 New York Cent. & H.R.R. Co. v. Aldridge, 135 N.Y. 83, 32 N.E. 50 (1892).

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(1) Definitions

§ 321. Accretion and alluvion defined

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1490, 1491

An "accretion" is the increase of riparian land by the gradual deposit, by water, of solid material,[1] whether mud, sand, or sediment,[2] so as to cause that to become dry land which was before covered by water.[3] It is similarly defined as the gradual and imperceptible accumulation of land along the shore or bank of a body of water[4] made by the water to which the land is contiguous[5] by the deposit of waterborne solids.[6] The term "alluvion" is applied to the deposit of such solids itself,[7] while accretion denotes the process of the addition of the solid material.[8] In other words, accretion is the act of deposit while alluvion denotes the result.[9] The terms "alluvion" and "accretion" are at times, however, used synonymously[10] or interchangeably.[11]

Footnotes

1 U.S. v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210 (D.D.C. 2008), aff'd, 630 F.3d 1039 (D.C. Cir. 2011); Turner v. Mullins, 162 S.W.3d 356 (Tex. App. Fort Worth 2005).

2 U.S. v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210 (D.D.C. 2008), aff'd, 630 F.3d 1039 (D.C. Cir. 2011).

3 U.S. v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210 (D.D.C. 2008), aff'd, 630 F.3d 1039 (D.C. Cir. 2011); Turner v. Mullins, 162 S.W.3d 356 (Tex. App. Fort Worth 2005).

An accretion occurs where bits of rock, sand, and dirt accumulate on a shore and push the water line back, thereby creating new land. Devon Energy Production Co., L.P. v. Norton, 685 F. Supp. 2d 614 (W.D. La. 2010).

4 Nourachi v. U.S., 632 F. Supp. 2d 1101 (M.D. Fla. 2009) (applying Florida law).

5 Cox v. F-S Prestress, Inc., 797 So. 2d 839 (Miss. 2001).

6 U.S. v. Byrne, 291 F.3d 1056 (9th Cir. 2002).

Accretion occurs when a river gradually and imperceptibly changes its course over a period of time, resulting in sedimentary deposits on one bank along the water line. Harding v. Savoy, 2004 MT 280, 323 Mont. 261, 100 P.3d 976 (2004).

Accretion is the gradual deposit and addition of soil along the bank of a waterbody caused by the gradual shift of the waterbody away from the accreting bank. Swaim v. Stephens Production Co., 359 Ark. 190, 196 S.W.3d 5 (2004).

7 Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); State v. Cockrell, 162 So. 2d 361 (La. Ct. App. 1st Cir. 1964), writ refused, 246 La. 343, 164 So. 2d 350 (1964).

Land that is deposited as a result of accretion is known as alluvion. U.S. v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210 (D.D.C. 2008), aff'd, 630 F.3d 1039 (D.C. Cir. 2011).

8 Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); State v. Cockrell, 162 So. 2d 361 (La. Ct. App. 1st Cir. 1964), writ refused, 246 La. 343, 164 So. 2d 350 (1964); Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011).

Accretion is the process of a gradual and imperceptible increase in land caused by the deposit of earth, sand, or sediment by contiguous waters. Parkison v. McCue, 831 N.E.2d 118 (Ind. Ct. App. 2005).

9 Gillilan v. Knighton, 420 So. 2d 924 (Fla. 2d DCA 1982).

10 Parm v. Shumate, 513 F.3d 135 (5th Cir. 2007) (applying Louisiana law); Katz v. Patterson, 135 Or. 449, 296 P. 54 (1931).

"Alluvion" may be defined as an addition to riparian land, gradual and imperceptible, made by the water to which the land is contiguous. Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258 (La. Ct. App. 2d Cir. 2004), writ denied, 903 So. 2d 442 (La. 2005), reconsideration not considered, 916 So. 2d 127 (La. 2005).

11 Gillilan v. Knighton, 420 So. 2d 924 (Fla. 2d DCA 1982).

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(1) Definitions

§ 322. Reliction defined

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1490

A "reliction" or "dereliction" is an increase of the land by a gradual and imperceptible withdrawal of any body of water,[1] or previously submerged land which becomes exposed by the gradual recession of water.[2] It is also defined as the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.[3] A reliction connotes the uncovering of land by a permanent recession of a body of water[4] rather than a mere temporary or seasonal exposure of the land.[5] Although the term "reliction" is applied to land made by the withdrawal of the waters by which it was previously covered, and the term "accretion" is applied to land formed by deposits displacing the waters,[6] the terms are often used interchangeably, and the law relating to accretions applies in all its features to relictions.[7]

Footnotes

1 Nourachi v. U.S., 632 F. Supp. 2d 1101 (M.D. Fla. 2009) (applying Florida law).

2 State of Cal. ex rel. State Lands Com'n v. U.S., 805 F.2d 857 (9th Cir. 1986).
A reliction occurs where land is exposed by the imperceptible recession of water. Devon Energy Production Co., L.P. v. Norton, 685 F. Supp. 2d 614 (W.D. La. 2010).

3 Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011).

4 Brainard v. State, 12 S.W.3d 6 (Tex. 1999) (disapproved of on other grounds by, Martin v. Amerman, 133 S.W.3d 262 (Tex. 2004)).

5 Sapp v. Frazier, 51 La. Ann. 1718, 26 So. 378 (1899).

6 Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

As to the definition of accretion, see § 321 to 324.

7 Devon Energy Production Co., L.P. v. Norton, 685 F. Supp. 2d 614 (W.D. La. 2010).

At common law, a reliction is generally treated no differently than an accretion. City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 4 A.3d 542 (2010).

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(1) Definitions

§ 323. Erosion defined

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1490

The term "erosion" is defined as the gradual washing away of land bordering on a stream or body of water by the action of the water.[1] It similarly has been defined as the gradual eating away of soil by the operation of currents or tides.[2]

Footnotes

1 State of Okl. v. State of Tex., 268 U.S. 252, 45 S. Ct. 497, 69 L. Ed. 937 (1925).

2 Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).

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(1) Definitions

§ 324. Avulsion defined

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1519, 1520

An "avulsion" is a sudden and perceptible loss of or addition to land by the action of water.[1] An "avulsion" also has been defined as a sudden change in the bed or course of a stream[2] that is violent and visible and arises from a known cause.[3] Thus, an avulsion occurs when a navigable river shifts by a sudden and perceptible change,[4] or when a river suddenly changes its channel to form a new one.[5]

Footnotes

1 State of Nebraska v. State of Iowa, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892); Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011).

2 State of Nebraska v. State of Iowa, 143 U.S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892); Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011).

3 Oppliger v. Vineyard, 19 Neb. App. 172, 803 N.W.2d 786 (2011), review denied, (Nov. 23, 2011).

4 Dye v. Anderson Tully Co., 2011 Ark. App. 503, 385 S.W.3d 342 (2011).

5 Harding v. Savoy, 2004 MT 280, 323 Mont. 261, 100 P.3d 976 (2004).

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(2) Process and Causation

§ 325. Nature of process

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1491, 1520

The formation of land along a body of water through accretion,[1] as well as reliction,[2] is marked by a gradual and imperceptible change to the riparian tract. A gradual and imperceptible change to a riparian tract is one that though witnesses may see, from time to time, that progress has been made, they could not perceive it while the process was going on.[3] The length of time during formation is not material if the increment added is utterly beyond the power of identification,[4] and an increment which either slowly or rapidly results from floods is an accretion if it is beyond the power of identification.[5] Furthermore, the movement of a river is an accretion where the change in the course of the river, though rapid in geologic terms, is gradual and is the result of erosion of land from one side of the river and the deposit of land on the opposite side.[6]

Avulsion, unlike accretion and reliction, is marked by a change to the riparian tract that is sudden and perceptible.[7]

Footnotes

1 Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 240 A.2d 665 (1968).

2 State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 478 P.2d 159 (1970).

3 Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912); Walker Lands, Inc. v. East Carroll Parish Police Jury, 871 So. 2d 1258 (La. Ct. App. 2d Cir. 2004), writ denied, 903 So. 2d 442 (La.

2005), reconsideration not considered, 916 So. 2d 127 (La. 2005); Cox v. F-S Prestress, Inc., 797 So. 2d 839 (Miss. 2001); Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).

4 Sieck v. Godsey, 254 Iowa 624, 118 N.W.2d 555 (1962).

5 Sieck v. Godsey, 254 Iowa 624, 118 N.W.2d 555 (1962).

Even a rapid change in a river's boundaries does not necessarily constitute avulsion; the key test is the ability to identify the land, formerly belonging to the landowner on one side of the river, now on the other side of the river. U.S. v. Keenan, 753 F.2d 681 (8th Cir. 1985).

6 U.S. v. Keenan, 753 F.2d 681 (8th Cir. 1985).

7 McCafferty v. Young, 144 Mont. 385, 397 P.2d 96 (1964) (holding where a river changes its course approximately a quarter of a mile in less than 100 years, the change is a substantial movement and is perceptible over the period of just one generation and is therefore avulsive); Buchheit v. Glasco, 1961 OK 109, 361 P.2d 838 (Okla. 1961).

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(2) Process and Causation

§ 326. Contiguity and direction of accretion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1491, 1493

A.L.R. Library

Right to accretion built up from one tract of land and extending laterally in front of adjoining tract without being contiguous thereto, 61 A.L.R.3d 1173

The land to which accretions attach must be bounded by water to entitle the owner of that land to the increase made by the accretions.[1] A claim to accretion land depends upon actual contiguity, without any separation of the claimant's land from the accumulated alluvion by the lands of another, however narrow the intervening strip may be or whatever the size of the claimant's tract behind it.[2] Thus, the owner of a lot bounded on one side by a street which is located along a river is not entitled as a riparian owner to accretions formed on the opposite side of the street.[3] Moreover, according to some cases, accretions must, in their formation, preserve uninterrupted contiguity or continuity,[4] and they cannot be saltatory.[5]

In order to effect a change of boundary, formations resulting from accretion must not only be made to the contiguous land but must also operate to produce an expansion of the shoreline outward from the tract to which they adhere.[6] An alluvial formation

arising at a point other than the water margin cannot become an accretion to the upland by extending itself until it meets the land.[7] In states in which the bed of a navigable river is susceptible of private ownership, accretions extending from the shore belong to the owner of the shoreline, but accretions arising in the river and extending toward the shore belong to the owner of the riverbed, which at low tide is not submerged although it is entirely covered at high tide.[8]

The rule requiring contiguity of accretions may be disregarded where its application would result in depriving an adjoining landowner of access to a body of water upon which his or her land originally fronted.[9] Where accretions to one tract spread or extend laterally in front of an adjoining tract, but without being contiguous thereto, the owner of the tract to which the formation is contiguous cannot claim title to the portion so extended in front of the adjoining tract where to do so would deprive the owner of the latter tract of his or her access to the water, and in such case, the title to such portion is vested in the owner of the tract in front of which it is situated.[10]

Footnotes

1 Spreckels v. Brown, 212 U.S. 208, 29 S. Ct. 256, 53 L. Ed. 476 (1909).

2 Spreckels v. Brown, 212 U.S. 208, 29 S. Ct. 256, 53 L. Ed. 476 (1909).

3 St. Louis Public Schools v. Risley, 77 U.S. 91, 19 L. Ed. 850, 1869 WL 11620 (1869); Irvin v. Crammond, 58 Ind. App. 540, 108 N.E. 539 (1915).

4 Crandall v. Smith, 134 Mo. 633, 36 S.W. 612 (1896).

5 Peterson v. City of St. Joseph, 348 Mo. 954, 156 S.W.2d 691 (1941).

6 Gubser v. Town, 202 Or. 55, 273 P.2d 430 (1954).

7 Peterson v. City of St. Joseph, 348 Mo. 954, 156 S.W.2d 691 (1941).

8 Wilson v. Watson, 144 Ky. 352, 138 S.W. 283 (1911).

9 Rondesvedt v. Running, 19 Wis. 2d 614, 121 N.W.2d 1 (1963).

10 Rondesvedt v. Running, 19 Wis. 2d 614, 121 N.W.2d 1 (1963).

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(2) Process and Causation

§ 327. Natural or artificial causation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1491

A.L.R. Library

Riparian owner's right to new land created by reliction or by accretion influenced by artificial condition not produced by such owner, 63 A.L.R.3d 249

Rights to land created at water's edge by filling or dredging, 91 A.L.R.2d 857

Generally, it is immaterial, with respect to the effects of accretion, reliction, or erosion, whether it results from natural or from artificial causes.[1] This rule has been applied in cases where the accretion, reliction, or erosion is indirectly induced by artificial conditions created by third persons.[2] Thus, where artificial accretions are cast upon the land of a landowner by a third party, without the intervention of the landowner, such artificial accretion inures to the title of the upland owner.[3] There is authority, however, that distinguishes between accretion caused by natural forces and accretion caused by the construction of artificial objects and holds that artificial accretion does not inure to the benefit of the upland owner.[4]

Although accretion accumulations need not be due entirely to natural causes, they ordinarily may not be caused by the riparian or littoral owner.[5] A riparian or littoral owner will not be permitted to increase his or her estate by creating an artificial condition for the purpose of effecting such an increase,[6] and thus a landowner may not acquire title to accreted land by artificially building up submerged land into dry land along his or her shoreline.[7] A riparian or littoral owner cannot extend his or her own property into the water by landfilling or purposefully causing accretion.[8]

Footnotes

1 St. Clair County v. Lovingston, 90 U.S. 46, 23 L. Ed. 59, 1874 WL 17483 (1874); Nordale v. Waxberg, 12 Alaska 399, 84 F. Supp. 1004 (Terr. Alaska 1949), judgment aff'd, 12 Alaska 695, 182 F.2d 1022 (9th Cir. 1950); Wilson v. Lucerne Canal and Power Co., 2007 WY 10, 150 P.3d 653 (Wyo. 2007).
The law generally makes no distinction between whether an accretion or avulsion is the product of natural forces or manmade efforts. City of Long Branch v. Jui Yung Liu, 203 N.J. 464, 4 A.3d 542 (2010).
Federal law makes no exception for relictions or accretions resulting from artificial causes. State of Cal. ex rel. State Lands Com'n v. U.S., 805 F.2d 857 (9th Cir. 1986).
Where the shore subsides, there is no significance to the relation between artificial and natural causes of this phenomenon. Coastal Indus. Water Authority v. York, 520 S.W.2d 494 (Tex. Civ. App. Houston 1st Dist. 1975), writ granted, (July 16, 1975) and judgment aff'd, 532 S.W.2d 949 (Tex. 1976).

2 St. Clair County v. Lovingston, 90 U.S. 46, 23 L. Ed. 59, 1874 WL 17483 (1874); State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 478 P.2d 159 (1970).
The rule as to ownership of accretion land remains the same even though the processes of accretion are caused or accelerated by the construction work of third parties. Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

3 H. K. Porter Co., Inc. v. Board of Sup'rs of Jackson County, 324 So. 2d 746 (Miss. 1975).

4 California ex rel. State Lands Com'n v. U. S., 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982), judgment entered, 459 U.S. 1, 103 S. Ct. 250, 74 L. Ed. 2d 1 (1982) (referring to California law).
Although it is true that an owner of upland may see the quantity of his or her land increased by natural accretion, that is, by the action of tides washing soil up along the shoreline, it is settled that such owner, having no rights or title in the tidelands, acquires no interest therein when they are filled by artificial means. South Shore Land Co. v. Petersen, 230 Cal. App. 2d 628, 41 Cal. Rptr. 277 (1st Dist. 1964).
Artificial placement of fill is not considered accretion. Delaware Ave., LLC v. Department of Conservation and Natural Resources, 997 A.2d 1231 (Pa. Commw. Ct. 2010), as amended without opinion, (June 11, 2010).

5 Michaelson v. Silver Beach Imp. Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273, 91 A.L.R.2d 846 (1961).

6 Coastal Indus. Water Authority v. York, 520 S.W.2d 494 (Tex. Civ. App. Houston 1st Dist. 1975), writ granted, (July 16, 1975) and judgment aff'd, 532 S.W.2d 949 (Tex. 1976).
Artificial accretions which are caused solely by the act of the upland owner should not inure to his or her benefit. Hilton Head Plantation Property Owners' Ass'n, Inc. v. Donald, 375 S.C. 220, 651 S.E.2d 614 (Ct. App. 2007).

7 TH Investments, Inc. v. Kirby Inland Marine, L.P., 218 S.W.3d 173 (Tex. App. Houston 14th Dist. 2007).

8 New Jersey v. New York, 523 U.S. 767, 118 S. Ct. 1726, 140 L. Ed. 2d 993 (1998), judgment entered, 526 U.S. 589, 119 S. Ct. 1743, 143 L. Ed. 2d 774 (1999).
Accretion does not refer to the purposeful addition of land to waterfront property through laying fill and the construction of wharves. U.S. v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210 (D.D.C. 2008), aff'd, 630 F.3d 1039 (D.C. Cir. 2011).

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3. Accretion, Alluvion, Reliction, Erosion, and Avulsion

b. Title and Rights; Effect upon Boundaries

(1) Accretion and Reliction

§ 328. Effect of accretion and reliction

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493

When the location of the bed of a body of water that constitutes the boundary of a tract of land is changed or shifted by accretion or reliction, the bed of the body of water, as so changed, remains the boundary line of the tract, which is extended accordingly.[1] The boundary line of the tract of land along the affected body of water follows the varying course of the body of water[2] or shifts with the water line.[3] The alluvion or dereliction formed along the bank of the body of a water, through accretion or reliction, belongs to the owners of the land adjacent to the body of water.[4] Accretion[5] and reliction,[6] in other words, pass title to the land added by the body of water to the owner of the adjoining riparian or littoral lands.

In most jurisdictions, the character of the stream or body of water as tidal, nontidal, navigable, or nonnavigable is immaterial as respects the application of the foregoing rules relating to accretion or reliction.[7] Furthermore, the law of accretion and reliction applies both to waters in which the title to the bed is in the state and to those where the riparian owner's title extends to the thread of the stream.[8] It also applies alike to streams that do and do not overflow their banks and where dikes and other defenses are or are not necessary to keep the water within proper limits.[9]

Observation:

One who has acquired title to land by adverse possession is entitled to any accretions to the land, regardless of the time of their formation.[10] When a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions.[11]

Footnotes

1 Brainard v. State, 12 S.W.3d 6 (Tex. 1999) (disapproved of on other grounds by, Martin v. Amerman, 133 S.W.3d 262 (Tex. 2004)).
As to the effect of accretion in bodies of water constituting the boundary between states, see Am. Jur. 2d, States, Territories, and Dependencies §§ 33, 34, and as to its effect in bodies of water constituting boundaries between countries, see Am. Jur. 2d, International Law § 33.

2 Georgia v. South Carolina, 497 U.S. 376, 110 S. Ct. 2903, 111 L. Ed. 2d 309 (1990) (accretion); Anderson v. Cumpston, 258 Neb. 891, 606 N.W.2d 817 (2000) (accretion and reliction).
When new land is formed by the process of accretion, the actual boundary moves as the waterway's course changes. Sea River Properties, LLC v. Parks, 253 Or. App. 643, 2012 WL 6048951 (2012).
Where the bed of a navigable river serves as the boundary between two counties, the boundary between the counties moves with the movement of the navigable river by the process of accretion. Dye v. Anderson Tully Co., 2011 Ark. App. 503, 385 S.W.3d 342 (2011).

3 Harding v. Savoy, 2004 MT 280, 323 Mont. 261, 100 P.3d 976 (2004) (accretion).
With an accretion, the boundaries of the riparian land owners change with the course of the stream. Bobo v. Jones, 364 Ark. 564, 222 S.W.3d 197 (2006).

4 Hamel's Farm, L.L.C. v. Muslow, 988 So. 2d 882 (La. Ct. App. 2d Cir. 2008), writ denied, 999 So. 2d 754 (La. 2009).
Accretions to land bounding on a river or the sea belong to the owners of the adjoining land. White v. Hartigan, 464 Mass. 400, 2013 WL 453081 (2013).
Land accreted to oceanfront property belongs to the oceanfront property owner under Hawaii common law. Maunalua Bay Beach Ohana 28 v. State, 122 Haw. 34, 222 P.3d 441 (Ct. App. 2009).
A riparian owner generally enjoys the right to any lands formed by accretion. Hilton Head Plantation Property Owners' Ass'n, Inc. v. Donald, 375 S.C. 220, 651 S.E.2d 614 (Ct. App. 2007).
The riparian owner of upland property is entitled to any increase in his or her land due to accretion. Trustees of Freeholders and Commonality of Town of Southampton v. Buoninfante, 303 A.D.2d 579, 756 N.Y.S.2d 629 (2d Dep't 2003).

5 Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010); U.S. v. Robertson Terminal Warehouse, Inc., 575 F. Supp. 2d 210 (D.D.C. 2008), aff'd, 630 F.3d 1039 (D.C. Cir. 2011); City of Waukegan, Ill. v. National Gypsum Co., 587 F. Supp. 2d 997 (N.D. Ill. 2008) (applying Illinois law); Brannon v. Boldt, 958 So. 2d 367 (Fla. 2d DCA 2007); Reads Landing Campers Ass'n, Inc. v. Township of Pepin, 546 N.W.2d 10 (Minn. 1996); Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994); Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012); Lynnhaven Dunes Condominium Ass'n v. City of Virginia Beach, 733 S.E.2d 911 (Va. 2012).
Under federal law, accretions are the property of the upland owner rather than the tidelands owner. California ex rel. State Lands Com'n v. U. S., 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982), judgment entered, 459 U.S. 1, 103 S. Ct. 250, 74 L. Ed. 2d 1 (1982).
Changes in the low water line resulting from natural accretion can add to a riparian landowner's property interest. Delaware Ave., LLC v. Department of Conservation and Natural Resources, 997 A.2d 1231 (Pa. Commw. Ct. 2010), as amended without opinion, (June 11, 2010).

Owners of property adjacent to a river, as riparian owners, become the owners of the additional land formed by accretion, which ownership encompasses both the surface and mineral rights. Swaim v. Stephens Production Co., 359 Ark. 190, 196 S.W.3d 5 (2004).

6 Brannon v. Boldt, 958 So. 2d 367 (Fla. 2d DCA 2007); Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

7 Shively v. Bowlby, 152 U.S. 1, 14 S. Ct. 548, 38 L. Ed. 331 (1894); State Engineer v. Cowles Bros., Inc., 86 Nev. 872, 478 P.2d 159 (1970).

As to the application of such rules being limited to rivers or streams in some civil-law jurisdictions, see § 334.

8 Doiron v. O'Bryan, 218 La. 1069, 51 So. 2d 628 (1951).

9 Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912); Brundage v. Knox, 279 Ill. 450, 117 N.E. 123 (1917).

10 Am. Jur. 2d, Adverse Possession § 265.

11 Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (applying Florida law).

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(1) Accretion and Reliction

§ 329. Reasons for rule as to acquisition of title

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493

The courts are not in complete accord as to the reasons for the general rule as to the acquisition of title to additions to land by accretion or reliction. One reason given for this rule is that expressed by the maxim de minimis non curat lex, meaning the law does not concern itself with trifles.[1] In a considerable number of cases, the rule has been predicated upon the principle of natural justice that one who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion.[2] The rule is also derived from the principle of public policy that it is in the interest of the community that all land should have an owner, and most convenient that imperceptible additions to the shore should follow the title to the shore itself.[3] Another reason for the rule is based upon the general policy of the law to promote the highest and best use of the land, the riparian owner being in the best position to develop and utilize that land.[4] Moreover, where waterways serve as the boundary between property owners and/or sovereigns, convenience and perhaps necessity mandate that the waterway should continue to serve as the boundary.[5] Perhaps the most practical reason for the rule is the necessity or desirability of preserving the riparian right of access to the water.[6]

CUMULATIVE SUPPLEMENT

Cases:

Owners of 50-foot wide way providing access to great pond also owned formerly submerged land that lay at end of way, extending 30 feet from former shoreline; although the cause of lowered water level in the great pond was unknown, water level had not changed for over 50 years, such ownership fulfilled way's original purpose of providing access to great pond, and Commonwealth disavowed any claim on formerly submerged land in amicus brief, asserting that it belonged to littoral owners. Mass. Gen. Laws Ann. ch. 183, § 58. Kubic v. Audette, 98 Mass. App. Ct. 289, 156 N.E.3d 204 (2020).

[END OF SUPPLEMENT]

Footnotes

1 Houston v. U.S. Gypsum Co., 580 F.2d 815 (5th Cir. 1978) (applying Mississippi law).

2 Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); Houston v. U.S. Gypsum Co., 580 F.2d 815 (5th Cir. 1978) (applying Mississippi law).
The upland owner's right to accretions is justified in large part because the upland owner's land is subject to erosion. U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).

3 Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); Wallace v. Driver, 61 Ark. 429, 33 S.W. 641 (1896).
A consideration underlying the rule is the promotion of stability in title and ownership of property as it concerns newly accreted property. White v. Hartigan, 464 Mass. 400, 2013 WL 453081 (2013).

4 Houston v. U.S. Gypsum Co., 580 F.2d 815 (5th Cir. 1978) (applying Mississippi law).

5 Houston v. U.S. Gypsum Co., 580 F.2d 815 (5th Cir. 1978) (applying Mississippi law).

6 City of St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Cox v. F-S Prestress, Inc., 797 So. 2d 839 (Miss. 2001).
An upland owner's right to accretion is a right that arises from a rule of convenience intended to balance public and private interests by automatically allocating small amounts of gradually accreted lands to the upland owner without resort to legal proceedings and without disturbing the upland owner's rights to access to and use of the water. Walton County v. Stop Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), aff'd, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

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(1) Accretion and Reliction

§ 330. Grant as including additions by accretion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1494, 1495, 1497

Where land fronting on a river or other body of water is conveyed by deed, the right to accretion already attached passes to the grantee, although not specially mentioned,[1] unless it is expressly excepted or reserved,[2] or has previously been conveyed to another.[3] In other words, there is a rebuttable presumption that a conveyance of the upland conveys accretions to the upland.[4] A conveyance of lands bordered by a river and intended to be riparian, though the river boundary is described by metes and bounds, thus carries with it all accreted lands.[5] Moreover, where the water and not the meander line of a lake or river is the boundary of land granted by the United States, the grantee takes title to accretions between the meander line and the water.[6]

Additions to land by accretion which are not included within the actual boundaries of a conveyance will not pass thereunder as appurtenant or incident to the land granted.[7]

Footnotes

1 Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); State v. Hatchie Coon Hunting and Fishing Club, Inc., 98 Ark. App. 206, 254 S.W.3d 11 (2007), rev'd on other grounds, 372 Ark. 547, 279 S.W.3d 56 (2008); Deering v. Gahm, 248 Iowa 1100, 84 N.W.2d 223 (1957).

Deed from which landowner derived title to land conveyed full riparian rights, and thus landowner owned accreted rights on navigable stream. Denison v. Hodge, 196 Or. App. 248, 100 P.3d 1144 (2004).

2 Jefferis v. East Omaha Land Co., 134 U.S. 178, 10 S. Ct. 518, 33 L. Ed. 872 (1890); Deering v. Gahm, 248 Iowa 1100, 84 N.W.2d 223 (1957).

3 Brown v. Jarratt, 228 Miss. 338, 87 So. 2d 874 (1956).

4 Jennings v. Shipp, 115 N.W.2d 12 (N.D. 1962); In re Estate of Rosenbaum, 2001 SD 44, 624 N.W.2d 821 (S.D. 2001).

The general common-law rule is that where a lot is shown on a plat to be bounded by the meander line of a river, the actual waterline is the boundary and not the line as drawn on the plat and under this rule, accretions to uplands pass by the grant. Bradford v. U.S. ex rel. Dept. of Interior, Bureau of Land Management Division of Lands and Minerals, 651 F.2d 700 (10th Cir. 1981).

5 Nourachi v. U.S., 655 F. Supp. 2d 1215 (M.D. Fla. 2009) (applying Florida law).

6 Stephenson v. Goff, 10 Rob. 99, 1845 WL 1435 (La. 1845).

Where the government has conveyed land by reference to a plan, and one boundary is the meanderings of a river or other body of water, accretions which occur after entry accrue to the benefit of the landowner. Smith v. U.S., 593 F.2d 982 (10th Cir. 1979).

7 Jones v. Johnston, 59 U.S. 150, 18 How. 150, 15 L. Ed. 320, 1855 WL 8233 (1855); Houston Bros. v. Grant, 112 Miss. 465, 73 So. 284 (1916).

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(2) Erosion and Avulsion

§ 331. Effect of erosion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493

When the location of the bed of a body of water that constitutes the boundary of a tract of land is changed or shifted by erosion, the bed of the body of water, as so changed, remains the boundary line of the tract, which is restricted accordingly.[1] In other words, if a body of water moves landward through erosion, littoral property will decrease in size in order to keep the water as its boundary, even to the point of ceasing to exist.[2] A riparian or littoral owner thus loses title to the land taken away from his or her banks or shores through erosion.[3]

Footnotes

1 Brainard v. State, 12 S.W.3d 6 (Tex. 1999) (disapproved of on other grounds by, Martin v. Amerman, 133 S.W.3d 262 (Tex. 2004)).

2 White v. Hartigan, 464 Mass. 400, 2013 WL 453081 (2013).

3 City of Waukegan, Ill. v. National Gypsum Co., 587 F. Supp. 2d 997 (N.D. Ill. 2008) (applying Illinois law); Walton County v. Stop Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), aff'd, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010); Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).
Under the common law, the uplands owner loses title in favor of the tideland owner, who is often the state, when land is lost to the sea by erosion. U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).

Changes in the low water line resulting from erosion can diminish a riparian landowner's property interest. Delaware Ave., LLC v. Department of Conservation and Natural Resources, 997 A.2d 1231 (Pa. Commw. Ct. 2010), as amended without opinion, (June 11, 2010).

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(2) Erosion and Avulsion

§ 332. Effect of avulsion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1521

If a body of water suddenly leaves its old bed and forms a new one by avulsion, the result works no change of boundary.[1] Riparian or littoral landowners are not affected by an avulsion,[2] and the boundaries of their land do not change[3] with the course of the body of water.[4] An avulsion does not divest a riparian or littoral property owner of title to his or her property[5] or change the underlying ownership of the property.[6] Formerly submerged land that becomes dry land by avulsion therefore continues to belong to the owner of the seabed.[7] The applicability of the law of avulsion is not dependent upon the navigability of the waterway.[8]

Footnotes

1 Georgia v. South Carolina, 497 U.S. 376, 110 S. Ct. 2903, 111 L. Ed. 2d 309 (1990); Anderson v. Cumpston, 258 Neb. 891, 606 N.W.2d 817 (2000); Coastal Indus. Water Authority v. York, 520 S.W.2d 494 (Tex. Civ. App. Houston 1st Dist. 1975), writ granted, (July 16, 1975) and judgment aff'd, 532 S.W.2d 949 (Tex. 1976). A sudden and abrupt change in the shoreline, being an avulsive event, does not alter the boundary line. U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).

2 Bobo v. Jones, 364 Ark. 564, 222 S.W.3d 197 (2006).

3 City of Waukegan, Ill. v. National Gypsum Co., 587 F. Supp. 2d 997 (N.D. Ill. 2008) (applying Illinois law); Bobo v. Jones, 364 Ark. 564, 222 S.W.3d 197 (2006); Trepanier v. County of Volusia, 965 So. 2d 276 (Fla. 5th DCA 2007); Harding v. Savoy, 2004 MT 280, 323 Mont. 261, 100 P.3d 976 (2004).

Regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change but remains ordinarily what was the mean high-water line before the event. Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010) (applying Florida law).

An avulsive event does not change the boundary of two estates separated by a water channel. Babel v. Schmidt, 17 Neb. App. 400, 765 N.W.2d 227 (2009).

4 Dye v. Anderson Tully Co., 2011 Ark. App. 503, 385 S.W.3d 342 (2011).

5 Severance v. Patterson, 370 S.W.3d 705 (Tex. 2012).

Where there is a sudden or marked change in a shoreline and the lands of the adjoining owner are flooded or the course of a stream changed, the adjoining owner is not thereby divested of his or her title since such a loss of land is an avulsion. City of Waukegan, Ill. v. National Gypsum Co., 587 F. Supp. 2d 997 (N.D. Ill. 2008) (applying Illinois law).

6 Reads Landing Campers Ass'n, Inc. v. Township of Pepin, 546 N.W.2d 10 (Minn. 1996).

7 Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010); Lynnhaven Dunes Condominium Ass'n v. City of Virginia Beach, 733 S.E.2d 911 (Va. 2012).

8 Babel v. Schmidt, 17 Neb. App. 400, 765 N.W.2d 227 (2009).

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(3) What Law Governs

§ 333. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493, 1519

Rights in additions to or extensions of land by accretion or reliction are governed, ordinarily, by the law of the state in which such accretion or reliction occurs.[1] State law, however, is subject to the primary right of the United States in navigable waters for the purposes of commerce, and the true construction of a grant by the government of lands bounded by navigable streams may involve a consideration of other matters besides the local law applicable to riparian rights.[2] Thus, federal law determines a dispute over accretions to oceanfront land where title rests with or was derived from the federal government.[3] Moreover, where title under a foreign grant is claimed as a result of accretion, the foreign law which was in effect at the date of the grant is applicable.[4] Further, the effects of accretive and avulsive changes in the course of a navigable stream forming an interstate boundary is determined by federal law though once title to a riverbed is vested in a state, federal law does not operate after that date to determine what effect on titles the movement of the river might have.[5]

Footnotes

1 City of St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891); Bode v. Rollwitz, 60 Mont. 481, 199 P. 688 (1921).
The equal footing doctrine, whereby new states, upon their admission to the union, acquire title to the lands underlying navigable waters within their boundaries, does not provide a basis for federal common

law to supersede a state's application of its own law in deciding title to lands which have reemerged after the movement of the bed of a navigable stream; state law should apply unless there is present some other principle of federal law requiring state law to be displaced. Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977).

The state, rather than the federal, law of accretion is applicable in an action for a declaratory judgment as to the title to lands formed by accretion in the Atlantic Ocean. Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 240 A.2d 665 (1968).

2 King v. City of St. Louis, 98 F. 641 (C.C.E.D. Mo. 1899).

3 California ex rel. State Lands Com'n v. U. S., 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982), judgment entered, 459 U.S. 1, 103 S. Ct. 250, 74 L. Ed. 2d 1 (1982) (federal law determines the boundary of oceanfront lands owned or patented by the United States).

Federal law governs disputes between a state and the United States over claims that there has been reliction or accretion to federal land. State of Cal. ex rel. State Lands Com'n v. U.S., 805 F.2d 857 (9th Cir. 1986).

Federal, rather than state, law governs the question of ownership of accretions gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood. Hughes v. State of Wash., 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967).

4 Luttes v. State, 159 Tex. 500, 324 S.W.2d 167 (1958).

5 California ex rel. State Lands Com'n v. U. S., 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982), judgment entered, 459 U.S. 1, 103 S. Ct. 250, 74 L. Ed. 2d 1 (1982).

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§ 334. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493, 1495

The general principle of accretion, which has that of diminution as its correlative, applies to such rivers as the Mississippi and the Missouri notwithstanding the extent and rapidity of the changes constantly effected.[1]

The right to accretions does not extend across an interstate boundary line into a state under the laws of which a riparian proprietor has title to the bed of the stream to such boundary line.[2] In some jurisdictions where the civil law prevails, the doctrines of accretion and reliction as affecting the ownership and boundaries of land are limited to land bordering on rivers or streams[3] and do not apply to land bordering on lakes or ponds, arms of the sea, or other large bodies of water.[4]

Where the State is the owner of the bed of a navigable stream to the high-water mark, the title to accreted lands does not vest in the owner of the upland until the surface of the accretion rises above the ordinary high-water mark.[5] Also, when a river moves over an owner's land and gradually destroys it completely, the title to the shifting river bed passes from the owner of the land to the state.[6] On the other hand, some courts have held that land which in its natural state was not covered with a navigable body of water when granted retains its character as private property when by the force of nature thereafter exerted it becomes submerged by a navigable body of water.[7]

A riparian owner may separate his or her upland from the accretions by conveying them separately to different grantees or by conveying one and retaining the other.[8]

The rights of the holder of an easement bounded by the margin of a stream or other body of water shift, as to their extent, with changes in such water margin.[9]

Footnotes

1 Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912).

2 City of St. Louis v. Rutz, 138 U.S. 226, 11 S. Ct. 337, 34 L. Ed. 941 (1891).

3 Doiron v. O'Bryan, 218 La. 1069, 51 So. 2d 628 (1951).

4 Ker & Co. v. Couden, 223 U.S. 268, 32 S. Ct. 284, 56 L. Ed. 432 (1912) (law of Louisiana); State v. Cockrell, 162 So. 2d 361 (La. Ct. App. 1st Cir. 1964), writ refused, 246 La. 343, 164 So. 2d 350 (1964).

5 State v. Raymond, 254 Iowa 828, 119 N.W.2d 135 (1963).

6 Tyson v. State of Iowa, 283 F.2d 802 (8th Cir. 1960) (applying Iowa law).

7 Tapoco, Inc. v. Peterson, 213 Tenn. 335, 373 S.W.2d 605 (1963).

8 Deering v. Gahm, 248 Iowa 1100, 84 N.W.2d 223 (1957).

9 In re West Tenth Street, Borough of Brooklyn, City of New York, 267 N.Y. 212, 196 N.E. 30, 98 A.L.R. 634 (1935).

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§ 335. Addition to or extension of island

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493

A.L.R. Library

Applicability of rules of accretion and reliction so as to confer upon owner of island or bar in navigable stream title to additions, 54 A.L.R.2d 643

The owner of an island in a river or stream, is, as a general principle, entitled to additions thereto by accretion or reliction, where the ordinary requisites of accretion and reliction are otherwise met, in the same manner as is a riparian owner on the mainland.[1] As a corollary of this general rule, where the accretions to the island meet the mainland or its accretions, the owner of the island is entitled to all the accretions forming on his or her shore to the point where they physically meet another shore or accretions thereto.[2] Thus, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretion to the line of contact.[3]

With regard to lengthwise accretions to an island, if the State owns the riverbed, as a general rule, lengthwise accretions to an island belong to the owner of the island.[4] In states, however, where the riparian owner, not the State, owns the riverbed to the middle of the stream, the island owner is not entitled to lengthwise accretions which extend beyond the lateral extensions of riparian property lines.[5]

In a state where any accretions to the bed of a navigable stream, in the form of islands, belong to the state, any accretion to the bed of a navigable stream in the form of an island also belongs to the state even if the island eventually joins by accretion to the riparian shore and becomes permanently attached.[6]

Footnotes

1 Houston v. U.S. Gypsum Co., 580 F.2d 815 (5th Cir. 1978) (applying Mississippi law); Dartmouth College v. Rose, 257 Iowa 533, 133 N.W.2d 687 (1965); Grape v. Laiblin, 181 Kan. 677, 314 P.2d 335 (1957); H. K. Porter Co., Inc. v. Board of Sup'rs of Jackson County, 324 So. 2d 746 (Miss. 1975).
Where accretion commences with the shore of an island and afterward extends to the mainland, or any distance short thereof, all accretion belongs to the owner of the island. Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).

2 People v. Ward Redwood, 225 Cal. App. 2d 385, 37 Cal. Rptr. 397 (1st Dist. 1964).

3 Durfee v. Keiffer, 168 Neb. 272, 95 N.W.2d 618 (1959).
Where an island is later joined with the mainland through accretion, the owner of the island is entitled to accretions to the island, just as the owner of the mainland is entitled to accretions to the mainland. Turner v. Mullins, 162 S.W.3d 356 (Tex. App. Fort Worth 2005).

4 Houston v. U.S. Gypsum Co., 580 F.2d 815 (5th Cir. 1978).

5 Houston v. U.S. Gypsum Co., 580 F.2d 815 (5th Cir. 1978) (applying Mississippi law and stating that Mississippi was such a state where the island owner did not own lengthwise accretions beyond the lateral extensions of the property lines).

6 State v. Sorensen, 436 N.W.2d 358 (Iowa 1989).

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§ 336. Shores of lakes and ponds

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493

The principles of the common law regarding accretion, reliction, erosion, and avulsion are generally held to apply to lakes and ponds.[1] Therefore, if accretions come to littoral proprietors of lands bounded by lakes, they take to the water's edge and follow the gradual recession of the waters to their edge, without regard to whether the lake is navigable or nonnavigable.[2] According to some authorities, however, the right of accretion is not recognized for lakes and ponds under the civil law.[3]

Footnotes

1 Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930).

2 Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818, 1864 WL 6609 (1864); Hilt v. Weber, 252 Mich. 198, 233 N.W. 159, 71 A.L.R. 1238 (1930).

3 § 334.

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§ 337. Seashore

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493

The principles of accretion and reliction are generally held to apply to the seas,[1] and thus where accretions are made to land along the seashore, the line of ownership follows the changing waterline.[2] In some jurisdictions where the civil law prevails, however, it appears that the doctrine of the acquisition of title by accretion or reliction is limited to rivers or streams and does not apply to the shore of the sea.[3] Also, a state may, by constitutional provision, deny to the owners of ocean-front property in the state any further rights in future accretions.[4]

Where lands are validly granted bordering on a seashore, or on an arm thereof, and thereafter pass into private ownership, the mere fact that a portion of such lands becomes avulsively submerged by a body of navigable water does not deprive the owners of their title to the land as long as the boundaries can be reasonably identified and so long as the general public or a public body has not come to use the site for navigation.[5]

Footnotes

1 Stevens v. Arnold, 262 U.S. 266, 43 S. Ct. 560, 67 L. Ed. 974 (1923); Michaelson v. Silver Beach Imp. Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273, 91 A.L.R.2d 846 (1961).
The littoral property owner gains when land is gradually added through accretion or reliction. U.S. v. Milner, 583 F.3d 1174 (9th Cir. 2009).

2 Michaelson v. Silver Beach Imp. Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273, 91 A.L.R.2d 846 (1961).

3 § 334.

4 Hughes v. State of Wash., 389 U.S. 290, 88 S. Ct. 438, 19 L. Ed. 2d 530 (1967) (applying Washington law).

5 Coastal Indus. Water Authority v. York, 520 S.W.2d 494 (Tex. Civ. App. Houston 1st Dist. 1975), writ granted, (July 16, 1975) and judgment aff'd, 532 S.W.2d 949 (Tex. 1976).

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§ 338. Lands owned by public or subject to public use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1493

The rules of accretion, reliction, erosion, and avulsion as determining boundaries apply to public as well as to private property and rights.[1] Thus, the government, if the owner of riparian land, is entitled to additions thereto by accretion the same as if the land were owned by an individual.[2] Likewise, a municipality may, as a riparian proprietor or owner of the front, acquire the right to alluvion.[3] Accretions in front of land dedicated to public use go to increase the land so dedicated.[4] If the public has a mere easement, however, the fee title to the increment, and rights incident thereto, will vest in the owner of the fee.[5]

Footnotes

1 State of Okl. v. State of Tex., 268 U.S. 252, 45 S. Ct. 497, 69 L. Ed. 937 (1925).

2 State of Missouri v. State of Nebraska, 196 U.S. 23, 25 S. Ct. 155, 49 L. Ed. 372 (1904).
The United States had title to oceanfront land created through accretion, resulting from the construction of a jetty, to the land owned by the United States on the coast of California. California ex rel. State Lands Com'n v. U. S., 457 U.S. 273, 102 S. Ct. 2432, 73 L. Ed. 2d 1 (1982), judgment entered, 459 U.S. 1, 103 S. Ct. 250, 74 L. Ed. 2d 1 (1982).

3 Mayor, Aldermen and Inhabitants of City of New Orleans v. U.S., 35 U.S. 662, 9 L. Ed. 573, 1836 WL 3725 (1836).

4 City of Hoboken v. Pennsylvania R. Co., 124 U.S. 656, 8 S. Ct. 643, 31 L. Ed. 543 (1888).

5 Banks v. Ogden, 69 U.S. 57, 17 L. Ed. 818, 1864 WL 6609 (1864); Irvin v. Crammond, 58 Ind. App. 540, 108 N.E. 539 (1915).

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§ 339. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1496

In considering the proper mode of division between adjoining riparian or littoral proprietors of additions to their lands by accretion or reliction, it is practically impossible to formulate a general rule by which all of the cases may be governed because of the many varying conditions.[1] However, accretions formed in front of and contiguous to the land of several owners belong to them all and cannot be claimed by one with whose land the first point of contact was made.[2] The inevitable consequence of a contrary rule would be that if it could be shown that the point of contact was first made to lands of one of the riparian owners, he or she would be entitled to the whole accretion subsequently made to the lands of other riparian owners on either side and thus would cut off their water boundaries and privileges.[3]

According to some courts, such additions should be divided equitably among the riparian or littoral proprietors.[4] A rule or mode approved in many cases is to give each of the several riparian or littoral proprietors a frontage on the new shore, proportional to their frontage on the old one,[5] or a frontage of the same width on the new shore as on the old shore.[6] In such case, the lines by which the new frontage is reached will be parallel, or converge or diverge, according as the new waterline is equal to and parallel with, or is longer or shorter than, the original shoreline.[7] In determining the extent of the original shoreline of the respective proprietors, the general line ought to be taken and not the actual length of the line on the water margin if it happens to be elongated by deep indentations or sharp projections.[8] In such case, it should be reduced, by an equitable and judicious estimate, to the general available line of the land upon the water.[9] The rule sometimes adopted, however, is to extend the original frontage of the respective lots as nearly as practicable at right angles with the course of the river to the thread of the stream.[10]

Another method or rule which has been applied in some jurisdictions in the case of additions to land bordering on nonnavigable streams is to extend the side lines of each tract to the water at the nearest point.[11]

One common principle which pervades all modes of division of additions to lands by accretion or reliction is that no regard is necessarily to be paid to the direction of the side lines between contiguous proprietors; the reference ordinarily is entirely to the shoreline.[12] Under some circumstances, however, a division according to the projection of the side lines may be equitable and proper.[13]

Accretions may be divided between adjacent riparian owners by agreement as well as by actual survey[14] and regardless of their exact legal rights.[15]

Footnotes

1 Stark v. Meriwether, 98 Kan. 10, 157 P. 438 (1916), aff'd, 99 Kan. 650, 163 P. 152 (1917).

2 Rondesvedt v. Running, 19 Wis. 2d 614, 121 N.W.2d 1 (1963) (lake).

3 Jones v. Hogue, 241 La. 407, 129 So. 2d 194 (1960).

4 Rondesvedt v. Running, 19 Wis. 2d 614, 121 N.W.2d 1 (1963).

5 Johnston v. Jones, 66 U.S. 209, 17 L. Ed. 117, 1861 WL 7651 (1861); North Shore, Inc. v. Wakefield, 530 N.W.2d 297 (N.D. 1995).
The general rule governing the apportionment of naturally accreted land between coterminous landowners is to divide the new shoreline among the proprietors in proportion to their respective rights in the old shoreline and to draw lines from the points of division thus made in the new shoreline to the points at which the old shoreline is intersected by the boundaries separating the proprietors. Spottswood v. Reimer, 41 So. 3d 787 (Ala. Civ. App. 2009).

6 Nourachi v. U.S., 655 F. Supp. 2d 1215 (M.D. Fla. 2009) (applying Florida law).

7 Feight v. Hansen, 81 S.D. 84, 131 N.W.2d 64 (1964).

8 Johnston v. Jones, 66 U.S. 209, 17 L. Ed. 117, 1861 WL 7651 (1861).

9 Johnston v. Jones, 66 U.S. 209, 17 L. Ed. 117, 1861 WL 7651 (1861).

10 Tappan v. Boston Water-Power Co., 157 Mass. 24, 31 N.E. 703 (1892).

11 Hubbard v. Manwell, 60 Vt. 235, 14 A. 693 (1888).

12 Johnston v. Jones, 66 U.S. 209, 17 L. Ed. 117, 1861 WL 7651 (1861); Feight v. Hansen, 81 S.D. 84, 131 N.W.2d 64 (1964).

13 Stark v. Meriwether, 98 Kan. 10, 157 P. 438 (1916), aff'd, 99 Kan. 650, 163 P. 152 (1917).

14 De Simone v. Kramer, 77 Wis. 2d 188, 252 N.W.2d 653 (1977).

15 Swanson v. Dalton, 178 Neb. 55, 131 N.W.2d 704 (1964).

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§ 340. On or along shore of lake

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West's Key Number Digest

West's Key Number Digest, Water Law 1496

If a lake is long and narrow or is traversed by a current readily identified, accretions to its shores may be divided among contiguous owners in accordance with the same rules that govern the apportionment of accretions to the banks of a stream.[1] One court has applied the rule that, in apportioning an accretion or reliction in a lake, the new division lines must be drawn in a straight line, at a right angle to the changed shoreline, from the points at which the division lines of coterminous owners intersected the original shoreline.[2] If the water of a lake all disappears, the several owners will take ratably to the center, the extent of each one's interest depending upon his or her frontage upon the lake.[3]

When a lake is of irregular shape, and originally contained no inlet or outlet, the inequalities caused by the broken shoreline should be equitably adjusted between the contiguous owners by disregarding such irregularities or by treating the lake as composed of separate bodies of water, according to the conditions.[4] Where such lakebed slopes to the center, and the shoreline is broken and irregular, it is not a proper method of division to establish central points and central lines in different portions of the lake and extend the side lines of the different riparian divisions to such central points and central lines approximately dividing the land according to the lake frontage of each tract.[5]

Footnotes

1 Scheifert v. Briegel, 90 Minn. 125, 96 N.W. 44 (1903); Karterud v. Karterud, 47 S.D. 58, 195 N.W. 972 (1923).

As to the apportionment of accretions, generally, see § 339.

2 Rondesvedt v. Running, 19 Wis. 2d 614, 121 N.W.2d 1 (1963).

3 Rhodes v. Cissell, 82 Ark. 367, 101 S.W. 758 (1907).

4 Scheifert v. Briegel, 90 Minn. 125, 96 N.W. 44 (1903).

5 Scheifert v. Briegel, 90 Minn. 125, 96 N.W. 44 (1903).

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§ 341. On or along shore of bay or cove

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1496

The dominant rule in the apportionment of accretions to the shore of a cove or bay is that each adjoining property owner must have his or her due proportion of the line bounding navigability and a course of access to it from the shore exclusive of every other owner and that all rules for apportionment or division are subject to such modification as may be necessary to accomplish this result.[1] In some cases, the rule applied is to divide the new shoreline among the riparian proprietors in proportion to their boundary on the old shoreline.[2] As a general proposition, however, when accretions to the shore of a cove or bay are to be apportioned, and the irregularity or curvature of the shore is such that lines cannot be drawn at right angles to the shore to accomplish this, the whole cove or bay is treated as a unit of the shoreline by drawing such perpendicular lines from its two boundary points or headlands to the line of navigability, and then apportioning the whole intervening boundary line of navigable water to the whole shoreline of the cove between such headlands, and drawing straight lines from the two termini of each apportioned share of navigable waterline to the respective termini of the corresponding shoreline pertaining to each owner.[3] In the case of shut-in or bottle-shaped coves, the accretions are divided among the littoral proprietors by lines drawn from their respective lands to a line drawn across the mouth or entrance of the cove, so as to give each proprietor the same proportion of that line as he or she has of the line bounding the cove.[4]

Footnotes

1 Thomas v. Ashland, Siskiwit & Iron River Logging Ry., 122 Wis. 519, 100 N.W. 993 (1904).

2 Blodgett & Davis Lumber Co. v. Peters, 87 Mich. 498, 49 N.W. 917 (1891).

3 Thomas v. Ashland, Siskiwit & Iron River Logging Ry., 122 Wis. 519, 100 N.W. 993 (1904).

4 Ashby v. Eastern R. Co., 46 Mass. 368, 5 Met. 368, 1842 WL 3963 (1842).

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§ 342. Accretion uniting separated tracts

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1496

In the changes which result in expelling or displacing water which has formerly separated the landholdings of different proprietors and in joining such holdings, the made land thus laid open to private ownership may be the result of accretions beginning at opposite waterlines and proceeding in opposite directions. In such cases, the line of contact between the accretions from opposite directions is the division line.[1] This rule has been applied where accretions to an island meet the mainland or its accretions.[2]

The apportionment of the accretions in such cases can rarely be made with more than substantial accuracy.[3] It would be manifestly impossible to draw exactly the line of meeting between accretions moving in one direction and those moving in the other.[4] Where there is a conflict in the evidence, some tending to prove one theory and some another, the question as to the manner, direction, and extent of accretions should be submitted to the jury.[5] The character of the timber growth adjacent to and upon made land in controversy may sometimes indicate the proper solution of such a question.[6] The jury may well take into consideration physical evidences of this and similarly relevant character as well as the bare assertions of witnesses.[7] Thus, the topography of the land in controversy and that adjacent to it may reveal the nature of the process by which the accretion was formed.[8]

Footnotes

1 Volkerding v. Brooks, 359 S.W.2d 736 (Mo. 1962).
2 § 335.
3 Stark v. Meriwether, 98 Kan. 10, 157 P. 438 (1916), aff'd, 99 Kan. 650, 163 P. 152 (1917).
4 Stark v. Meriwether, 98 Kan. 10, 157 P. 438 (1916), aff'd, 99 Kan. 650, 163 P. 152 (1917).
5 Stark v. Meriwether, 98 Kan. 10, 157 P. 438 (1916), aff'd, 99 Kan. 650, 163 P. 152 (1917).
6 Fowler v. Wood, 73 Kan. 511, 85 P. 763 (1906).
7 Fowler v. Wood, 73 Kan. 511, 85 P. 763 (1906).
8 Fowler v. Wood, 73 Kan. 511, 85 P. 763 (1906).

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§ 343. Generally

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West's Key Number Digest

West's Key Number Digest, Water Law 1500 to 1517, 1522(1) to 1522(14)

Trial Strategy

Proof of Accretion or Avulsion in Title and Boundary Disputes Over Additions to Riparian Land, 73 Am. Jur. Proof of Facts 3d 167

The usual remedies for the protection and enforcement of rights with respect to real property generally are available in the case of additions to, or the loss or submergence of, land, by accretion, erosion, reliction, or avulsion.[1] Among the remedies available are an action for damages,[2] an action for a declaratory judgment,[3] and an action to quiet title.[4] In a proceeding to establish interior boundary lines and to quiet title to a large tract of accretion land left when a river moved from its original course, the owners of meandered lands, who have prima facie rights to such accretion, are indispensable parties.[5]

A party who seeks to have title in real estate quieted in him or her on the ground that it is accretion to land to which he or she has title has the burden of proving the accretion by a preponderance of the evidence.[6] Similarly, a party who seeks to have title in real estate quieted in him or her on the ground of reliction[7] or avulsion[8] has the burden of proving the same by a preponderance of the evidence.

Footnotes

1 Kinkead v. Turgeon, 74 Neb. 573, 109 N.W. 744 (1906).

2 Freeland v. Pennsylvania R. Co., 197 Pa. 529, 47 A. 745 (1901) (action for damages for interfering with process of accretion).

3 Borough of Wildwood Crest v. Masciarella, 51 N.J. 352, 240 A.2d 665 (1968).

4 Monument Farms, Inc. v. Daggett, 2 Neb. App. 988, 520 N.W.2d 556 (1994).

5 Kapp v. Hansen, 79 S.D. 279, 111 N.W.2d 333 (1961).

6 Madson v. TBT Ltd. Liability Co., 12 Neb. App. 773, 686 N.W.2d 85 (2004); Wilson v. Lucerne Canal and Power Co., 2007 WY 10, 150 P.3d 653 (Wyo. 2007).

7 Wilson v. Lucerne Canal and Power Co., 2007 WY 10, 150 P.3d 653 (Wyo. 2007).

8 Babel v. Schmidt, 17 Neb. App. 400, 765 N.W.2d 227 (2009).

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§ 344. Presumption of erosion or accretion, rather than avulsion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1508, 1522(8)

In a case where the title and rights of the litigants depend upon whether a change in riparian land has occurred by reason of erosion or avulsion, it will be presumed, in the absence of clear evidence to the contrary, that the change was by erosion rather than avulsion.[1] Also, in the absence of evidence to the contrary, the law will presume accretion rather than avulsion.[2] These presumptions are rebuttable, however, and do not apply where the evidence sufficiently shows an avulsive change.[3] Moreover, at least in one state, there is no presumption that a change in a river channel is due to accretion.[4]

Footnotes

1 State v. Bonelli Cattle Co., 107 Ariz. 465, 489 P.2d 699 (1971), opinion supplemented, 108 Ariz. 258, 495 P.2d 1312 (1972), judgment rev'd on other grounds, 414 U.S. 313, 94 S. Ct. 517, 38 L. Ed. 2d 526 (1973) (overruled on other grounds by, Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 97 S. Ct. 582, 50 L. Ed. 2d 550 (1977)); Murray v. State, 226 Kan. 26, 596 P.2d 805 (1979).

2 Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979); Murray v. State, 226 Kan. 26, 596 P.2d 805 (1979). There is a strong legal presumption in favor of accretion and against avulsion, for purposes of determining a boundary defined by a navigable river. Dye v. Anderson Tully Co., 2011 Ark. App. 503, 385 S.W.3d 342 (2011).

3 Nesbitt v. Wolfkiel, 100 Idaho 396, 598 P.2d 1046 (1979).

4 Omaha Indian Tribe, Treaty of 1854 with U.S. v. Wilson, 614 F.2d 1153 (8th Cir. 1980) (applying Nebraska law).

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4. Batture

§ 345. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1498

Batture is alluvion which is formed successively and imperceptibly by alluvial accretions (sedimentation).[1] In some cases, the term "batture" has been used as synonymous with "alluvion"[2] and has been defined as the alluvial land between the river's low water edge and the inside toe of the levee.[3] Batture below the ordinary low water mark is part of the bed of the river.[4]

Footnotes

1 DeSambourg v. Board of Com'rs for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).

2 Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 1841 WL 1326 (1841).
As to the definition of alluvion, see §§ 321 to 324.

3 Wood Marine Service, Inc. v. City of Harahan, 858 F.2d 1061 (5th Cir. 1988).

4 DeSambourg v. Board of Com'rs for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).

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IV. Land Areas Associated with Waters and Water Courses

A. Beds, Banks, and Shores

4. Batture

§ 346. Title and rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1498

The title to batture is usually vested in the owner of the soil upon which it forms or to which it is attached.[1] To be susceptible of private ownership, batture must be reclaimed from the river, that is, it must form sufficient elevation and magnitude to rise above the waters and become part of the bank.[2] The right of batture is inherent in the riparian property, resulting from natural as well as municipal law.[3]

Like the bank, batture belongs to the riparian owner but, as long as it is not actually incorporated into the main land, as when it is separated from it by a levee or bank, the use of both the bank and batture remain in the public.[4] Thus, although the batture is private land, it is subject to numerous public uses incident to navigation such as the right to moor temporarily, to unload cargo, and to pass freely over the batture from the river.[5] Moreover, although a riparian owner possesses the right to develop batture, the owner may not obstruct or impede the public right of navigation.[6] A riparian landowner has only the naked legal title to batture property subject to legal servitude, without the right of usus and fructus.[7]

Footnotes

1 Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 1841 WL 1326 (1841).

2 DeSambourg v. Board of Com'rs for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).

3 DeSambourg v. Board of Com'rs for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).

4 DeSambourg v. Board of Com'rs for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).

5 Wood Marine Service, Inc. v. City of Harahan, 858 F.2d 1061 (5th Cir. 1988) (applying Louisiana law).

6 Wood Marine Service, Inc. v. City of Harahan, 858 F.2d 1061 (5th Cir. 1988) (applying Louisiana law).

7 DeSambourg v. Board of Com'rs for Grand Prairie Levee Dist., 621 So. 2d 602 (La. 1993).

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5. Reclamation

§ 347. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1467

A.L.R. Library

Conservation: validity, construction, and application of enactments restricting land development by dredging or filling, 46 A.L.R.3d 1422

Rights to land created at water's edge by filling or dredging, 91 A.L.R.2d 857

Forms

Am. Jur. Pleading and Practice Forms, Waters § 111 (Complaint, petition, or declaration—For declaratory judgment of right to fill marshland—Law regulating filling unconstitutional—Class action)

Am. Jur. Pleading and Practice Forms, Waters § 113 (Complaint, petition, or declaration—To enjoin dredging and filling wetlands bordering river—Protection of public trust in natural resources)

The owner of the shore or bed of a navigable stream or other body of water is ordinarily entitled to reclaim any submerged land by filling out to the line of navigability.[1] Furthermore, a riparian or littoral proprietor may generally separately alienate his or

her right to improve, reclaim, and occupy submerged lands out to the point of navigability.[2] Where publicly owned submerged soil has been filled in by an abutting upland owner in the exercise of his or her riparian rights of access or wharfage, such owner, although not acquiring title, has riparian rights in or across the made land, at least as against uses other than public uses in aid of navigation, commerce, or fishery.[3]

When an avulsive event regarding navigable waters leads to the loss of land, the affected property owner has the right to reclaim the lost land within a reasonable time.[4] Thus, an owner of a still identifiable piece of land carried away by avulsion has the right to reclaim it from any owner of land to which it has become attached, and to return it to its original site, so long as it is done within the prescribed period of time.[5]

A dredging and filling project to reclaim submerged lands may be subject to approvals or permit requirements addressing the effects of the project on such matters as endangered species[6] or state wetlands.[7] In some cases, the courts, while recognizing the validity of the statutes, have refused to uphold the application of the permit-requirement for the reason that the restriction or prohibition against filling or dredging unreasonably deprives the owner of the use of the land and results in an unconstitutional taking without just compensation.[8]

Observation:

When a state extends its land domain by pushing back the sea, its sovereignty extends to the new land, and the Federal Submerged Lands Act[9] which grants to each state on the Pacific Coast all submerged lands shoreward of a line three geographical miles from the seaward limit of inland waters gives to that state those submerged lands enclosed or reclaimed by artificial structures before or after the enactment of the statute.[10]

Footnotes

1 State v. Knowles-Lombard Co., 122 Conn. 263, 188 A. 275, 107 A.L.R. 1344 (1936).

2 Gilbert v. Eldridge, 47 Minn. 210, 49 N.W. 679 (1891).

3 U.S. v. Turner, 175 F.2d 644 (5th Cir. 1949) (applying law of Alabama).

4 Walton County v. Stop Beach Renourishment, Inc., 998 So. 2d 1102 (Fla. 2008), aff'd, 130 S. Ct. 2592, 177 L. Ed. 2d 184 (2010).

5 Beach Colony II v. California Coastal Com., 151 Cal. App. 3d 1107, 199 Cal. Rptr. 195 (4th Dist. 1984).

6 Metropolitan Dade County v. Coscan Florida, Inc., 609 So. 2d 644 (Fla. 3d DCA 1992).

7 Candlestick Properties, Inc. v. San Francisco Bay Conservation etc. Com., 11 Cal. App. 3d 557, 89 Cal. Rptr. 897 (1st Dist. 1970).

8 Zabel v. Pinellas County Water and Nav. Control Authority, 171 So. 2d 376 (Fla. 1965); State v. Johnson, 265 A.2d 711, 46 A.L.R.3d 1414 (Me. 1970).

9 43 U.S.C.A. §§ 1301 to 1315.

10 U.S. v. State of Cal., 381 U.S. 139, 85 S. Ct. 1401, 14 L. Ed. 2d 296 (1965), supplemented, 382 U.S. 448, 86 S. Ct. 607, 15 L. Ed. 2d 517 (1966), opinion supplemented, 432 U.S. 40, 97 S. Ct. 2915, 53 L. Ed. 2d 94 (1977).
As to the Submerged Lands Act, generally, see § 302.

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5. Reclamation

§ 348. Effect of reclamation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1467

Land lawfully reclaimed loses its character as foreshore,[1] the easements and servitudes to which it was subject by reason of such character are extinguished,[2] and the incidents of upland become attached thereto.[3] The fact that the dredging of a harbor is a project in aid of navigation has been held not to entitle the State to cast the material dredged along the shoreline of littoral proprietors so as to cut off their exclusive access to the sea.[4]

Footnotes

1 Marine Ry. & Coal Co. v. U.S., 257 U.S. 47, 42 S. Ct. 32, 66 L. Ed. 124 (1921).

2 Marine Ry. & Coal Co. v. U.S., 257 U.S. 47, 42 S. Ct. 32, 66 L. Ed. 124 (1921).

3 Port of Seattle v. Oregon & W. R. Co., 255 U.S. 56, 41 S. Ct. 237, 65 L. Ed. 500 (1921).

4 Michaelson v. Silver Beach Imp. Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273, 91 A.L.R.2d 846 (1961).

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5. Reclamation

§ 349. Ownership of land filled in by owner of shore or bed

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1467

The owner of the shore or bed of a navigable stream or other body of water is ordinarily entitled to reclaim submerged land by filling out to the line of navigability,[1] and an upland proprietor is generally the owner of made land which he or she created by filling tidal or submerged lands to which he or she held title, at least as against all persons except the state or federal government acting in aid of navigation or commerce.[2] Thus, a littoral owner who fills along his or her shoreline, with the acquiescence or express or implied approval of the state and who improves upon the land in justifiable reliance on the state approval, is able to establish title to land that is free and clear provided that the littoral owner has not created any interference with the public-trust rights of fishery, commerce, and navigation.[3] Title to land covered by water and belonging to the state, however, cannot be acquired by the owner of the adjacent uplands by filling in in front of them, without permission or authority, and thus extending them out beyond the former waterline.[4]

Filled land created by the owner of the shore or submerged soil, held under separate title from the adjacent upland, generally belongs to such owner and not to the upland proprietor.[5] The state or its grantee is the owner, as against the abutting riparian proprietor, of filled land at the edge of navigable water where such land is created by the former as owner of the shore or submerged soil, at least where the filling is in aid of navigation or commerce.[6] The riparian proprietor's right of access to navigable water has been expressly denied across filled land which was created in aid of navigation or commerce by or on behalf of the public owner of tidal or submerged soil.[7] The separate owner of the bed of nonnavigable waters, rather than the riparian proprietor, is the owner of land at the water's edge which the former created by filling the submerged soil.[8]

Footnotes

1 § 347.

2 People v. Broedell, 365 Mich. 201, 112 N.W.2d 517 (1961).

3 Greater Providence Chamber of Commerce v. State, 657 A.2d 1038 (R.I. 1995).

4 Philadelphia Co. v. Stimson, 223 U.S. 605, 32 S. Ct. 340, 56 L. Ed. 570 (1912); Cleveland Boat Service v. City of Cleveland, 102 Ohio App. 255, 2 Ohio Op. 2d 292, 73 Ohio L. Abs. 557, 130 N.E.2d 421 (8th Dist. Cuyahoga County 1955), judgment aff'd, 165 Ohio St. 429, 60 Ohio Op. 85, 136 N.E.2d 274 (1956).

5 Marine Ry. & Coal Co. v. U.S., 257 U.S. 47, 42 S. Ct. 32, 66 L. Ed. 124 (1921).

6 Michaelson v. Silver Beach Imp. Ass'n, Inc., 342 Mass. 251, 173 N.E.2d 273, 91 A.L.R.2d 846 (1961).

7 City of Newport Beach v. Fager, 39 Cal. App. 2d 23, 102 P.2d 438 (2d Dist. 1940).

8 Kelly v. King, 225 N.C. 709, 36 S.E.2d 220 (1945).

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§ 350. Land created by filling or dredging by third person

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1467

Some courts have held that land created at the water's edge as the result of filling or dredging by a third person is the property of the adjacent upland owner as between those parties.[1] Also, as against other riparian proprietors, the upland owner has the right to filled land created by a third person.[2] Other courts, however, have held that land which a third party created at the water's edge by filling a publicly owned shore or submerged soil is the property of the state or its grantee as against both the filler and the upland proprietor.[3] Under some circumstances, the adjacent upland proprietor may be held to be the owner of land which the public owner of submerged or tidal soils created by filling or dredging where the creation of the land is not substantially related to a navigational or other paramount purpose.[4]

Footnotes

1 Illinois Cent. R. Co. v. State of Illinois, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); City of Missoula v. Bakke, 121 Mont. 534, 198 P.2d 769 (1948).

2 Gillihan v. Cieloha, 74 Or. 462, 145 P. 1061 (1915).

3 People v. Hecker, 179 Cal. App. 2d 823, 4 Cal. Rptr. 334 (2d Dist. 1960).

4 Lakeside Boating and Bathing Inc. v. State, 344 N.W.2d 217 (Iowa 1984).

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§ 351. Apportionment between adjacent proprietors

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1467

In cases concerning the apportionment of filled land between adjacent riparian or littoral proprietors, the rights of the state or of third parties not being involved, the courts have applied the rules governing the division of natural accretion,[1] and upland owners have usually been awarded a frontage on the new waterline proportionate to that which they had on the original shore, in the absence of peculiarities in the formation of the shore or other circumstances making that course inequitable.[2] Thus, new land on a lakeshore created by a landowner's unauthorized filling should be apportioned in proportion to each owner's share of the original shoreline.[3]

Footnotes

1 §§ 339 to 342.

2 Causey v. Gray, 250 Md. 380, 243 A.2d 575 (1968).

3 North Shore, Inc. v. Wakefield, 530 N.W.2d 297 (N.D. 1995).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 355. Appropriation doctrine, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1555

Individual rights to water can be acquired by the appropriation of water,[1] which is the taking and diverting of a quantity of water and putting it to beneficial use in accordance with the laws of the state where such water is found.[2] By doing so, under such laws, one acquires a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations.[3] This means or method of acquiring a vested and continuing right to take a definite quantity of water from a natural watercourse or other body of water is generally known as the appropriation doctrine, or the prior appropriation doctrine.[4]

The appropriation doctrine appears to have had its origin in early customs as to the use of waters on public lands[5] and is based upon the premise that all unused water belongs to all of the people of the state.[6] Under the doctrine, the one who first diverts and uses water beneficially establishes a right to its continued use as long as the water is beneficially diverted.[7] The appropriation doctrine applies to any taking of water for other than riparian or overlying uses.[8]

Definition:

A "water appropriation right," or appropriative right, has been defined as the right to divert unappropriated streamwater for beneficial use[9] or the right to take water from a watercourse that does not run adjacent to a landowner's property.[10]

CUMULATIVE SUPPLEMENT

Cases:

One does not "own" water; rather, one owns the right to use water within the limitations of state's prior appropriation doctrine. Concerning Application for Water Rights of Sedalia Water and Sanitation District in Douglas County, 2015 CO 8, 343 P.3d 16 (Colo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Romero v. Bernell, 603 F. Supp. 2d 1333 (D.N.M. 2009).

2 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).
"Appropriation" is defined as the application of a specified portion of the waters of a state to a beneficial use pursuant to the procedures prescribed by law. V Bar Ranch LLC v. Cotten, 233 P.3d 1200 (Colo. 2010).
As to the appropriation of water for the purposes of irrigation, see Am. Jur. 2d, Irrigation §§ 16 to 34.

3 State of Arizona v. State of California, 283 U.S. 423, 51 S. Ct. 522, 75 L. Ed. 1154 (1931).

4 Martinez v. Cook, 56 N.M. 343, 244 P.2d 134 (1952).

5 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874); Le Quime v. Chambers, 15 Idaho 405, 98 P. 415 (1908).

6 Cochran v. State, Dept. of Agr., Div. of Water Resources, 291 Kan. 898, 249 P.3d 434 (2011).

7 Cappaert v. U. S., 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976); City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000); Bartley v. Sone, 527 S.W.2d 754 (Tex. Civ. App. San Antonio 1974), writ refused n.r.e., (Dec. 31, 1975).
The appropriation doctrine confers upon one who actually diverts and uses water the right to do so provided that the water is used for reasonable and beneficial uses and is surplus to that used by riparians or earlier appropriators. El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

8 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).

9 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).
A "water appropriation right" is defined by statute as a right, acquired under the provisions of the relevant act, to divert from a definite water supply a specific quantity of water at a specific rate of diversion, provided such water is available in excess of the requirements of all vested rights that relate to such supply and all appropriation rights of earlier date that relate to such supply, and to apply such water to a specific beneficial use or uses in preference to all appropriations right of later date. Nelson v. State, Dept. of Agriculture, 44 Kan. App. 2d 1042, 242 P.3d 1259 (2010).

10 California Farm Bureau Federation v. State Water Resources Control Bd., 51 Cal. 4th 421, 121 Cal. Rptr. 3d 37, 247 P.3d 112 (2011), as modified without opinion, (Apr. 20, 2011).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 356. Extent of adoption of doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1555

In some jurisdictions, especially in the arid or semiarid regions, the doctrine of riparian rights has been declared to be unsuited to the conditions, and the doctrine of appropriation adopted as a rule of general application.[1] Thus, several jurisdictions follow the doctrine of appropriation in regard to water rights.[2] In other jurisdictions, the application of the doctrine is limited to waters on the public domain, the common-law doctrine of riparian rights remaining applicable to waters on or contiguous to lands held under private ownership.[3] In some states, both riparian and appropriatory rights are recognized.[4]

Footnotes

1 West Maricopa Combine, Inc. v. Arizona Dept. of Water Resources, 200 Ariz. 400, 26 P.3d 1171 (Ct. App. Div. 1 2001); In re Application A-16642, 236 Neb. 671, 463 N.W.2d 591 (1990); In re Adjudication of Water Rights in the Llano River Watershed of Colorado River Basin, 642 S.W.2d 446 (Tex. 1982); Stubbs v. Ercanbrack, 13 Utah 2d 45, 368 P.2d 461 (1962).
Under Nevada law, water rights can be created only by appropriation for beneficial use. Cappaert v. U. S., 426 U.S. 128, 96 S. Ct. 2062, 48 L. Ed. 2d 523 (1976).
As to the recognition of the doctrine of riparian rights, see § 34.
As to the land to which riparian rights attach, see §§ 46, 47.

2 Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011) (referring to Montana and Wyoming); Metropolitan Suburban Water Users Ass'n v. Colorado River Water Conservation Dist., 148 Colo. 173, 365 P.2d 273 (1961); Hydro Resources Corp. v. Gray, 2007-NMSC-061, 143 N.M. 142, 173 P.3d 749 (2007); In re General Determination of Rights to the Use of Water, 2004 UT 106, 110 P.3d 666 (Utah 2004).

3 Lawrence v. Southard, 192 Wash. 287, 73 P.2d 722, 115 A.L.R. 1308 (1937).

4 § 374.

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 357. Waters appropriable

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1560 to 1566

The doctrine of appropriation is applicable to waters which are subject to the public right.[1] In some jurisdictions, there is a presumption that all waters are tributary to a natural stream and subject to the right of appropriation.[2] Specifically, surface water,[3] spring water,[4] seepage water,[5] and return flows[6] have been held subject to appropriation. On the other hand, percolating waters ordinarily have been held not subject to appropriation.[7] Water passing through the soil, not in a stream, but by way of filtration, is not distinctive from the soil itself but forms one of its component parts, and in this condition it is not the subject of appropriation;[8] when, however, such water gathers in sufficient volume, whether by percolation or otherwise, to form a running stream, it no longer partakes of the nature of the soil but has become separate and distinct therefrom and constitutes a stream of flowing water subject to appropriation.[9]

With respect to waters on public lands of the United States, such waters are subject to appropriation where the right of appropriation is recognized by local laws or customs.[10] Thus, an appropriator can obtain a water right in waters located on federal land by following state law in obtaining that water right.[11]

In some jurisdictions, any water not needed for the reasonable beneficial use of those having prior rights is excess or surplus water and may rightly be appropriated on privately owned land for a nonoverlying use.[12]

Definition:

Unappropriated water is that water available for appropriation because it is not subject to an existing appropriation right.[13]

Footnotes

1 Carson v. Gentner, 33 Or. 512, 52 P. 506 (1898); Benton v. Johncox, 17 Wash. 277, 49 P. 495 (1897).
As to the effect of the doctrine of appropriation on the principle of riparian rights with respect to irrigation rights, see Am. Jur. 2d, Irrigation § 17.
As to the right to appropriate water from subterranean streams, see § 223.
As to the right to appropriate overflows or floodwaters, see § 291.
As to the doctrine of appropriation being limited in certain jurisdictions to waters in the public domain, see § 356.

2 Well Augmentation Subdistrict of Central Colorado Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009), as modified without opinion on denial of reh'g, (Dec. 14, 2009).

3 Davis v. Agua Sierra Resources, L.L.C., 220 Ariz. 108, 203 P.3d 506 (2009).

4 § 248.

5 Well Augmentation Subdistrict of Central Colorado Water Conservancy Dist. v. City of Aurora, 221 P.3d 399 (Colo. 2009), as modified without opinion on denial of reh'g, (Dec. 14, 2009).

6 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

7 § 233.

8 North Gualala Water Co. v. State Water Resources Control Bd., 139 Cal. App. 4th 1577, 43 Cal. Rptr. 3d 821 (1st Dist. 2006), as modified without opinion on denial of reh'g, (June 16, 2006).

9 North Gualala Water Co. v. State Water Resources Control Bd., 139 Cal. App. 4th 1577, 43 Cal. Rptr. 3d 821 (1st Dist. 2006), as modified without opinion on denial of reh'g, (June 16, 2006).

10 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

11 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

12 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).

13 Central Platte Natural Resources Dist. v. State of Wyo., 245 Neb. 439, 513 N.W.2d 847 (1994).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 358. Who may exercise right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1567

Ordinarily, the right to appropriate water is not confined to riparian proprietors.[1] In some jurisdictions, however, where the title to land bordering on a stream is vested in private individuals, the right given by statute to appropriate the water of such stream can be exercised only by one who has riparian rights, either as owner of the riparian land or through grant of the riparian owner, and a trespasser on riparian land cannot lawfully exercise there any right to such water or acquire any right therein.[2]

The right of appropriation of water may be exercised by a state agency,[3] the United States,[4] or by an alien.[5]

CUMULATIVE SUPPLEMENT

Cases:

Pursuant to the public trust doctrine of the state constitution, the duty and authority of the state and its subdivisions to weigh competing public and private uses of water on a case-by-case basis is independent of statutory duties and authorities created by the legislature. Const. Art. 11, § 1. Kauai Springs, Inc. v. Planning Com'n of County of Kauai, 324 P.3d 951 (Haw. 2014).

Whether water districts' application for permit to appropriate water from creek would conflict with "local public interest" did not require showing that proposed use would bring new water or that appropriation was proper exercise of water districts' eminent domain authority. Idaho Code Ann. §§ 42-202B, 42-203A(5)(e). North Snake Ground Water District v. Idaho Department of Water Resources, 376 P.3d 722 (Idaho 2016).

[END OF SUPPLEMENT]

Footnotes

1 Boquillas Land & Cattle Co. v. Curtis, 213 U.S. 339, 29 S. Ct. 493, 53 L. Ed. 822 (1909). Appropriators need not own land contiguous to the watercourse. El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

2 Smith v. Denniff, 23 Mont. 65, 57 P. 557 (1899), rev'd on other grounds, 24 Mont. 20, 60 P. 398 (1900).

3 State, Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

4 Natural Resources Defense Council v. Kempthorne, 621 F. Supp. 2d 954 (E.D. Cal. 2009), decision clarified, 627 F. Supp. 2d 1212 (E.D. Cal. 2009), on reconsideration, 2009 WL 2424569 (E.D. Cal. 2009) (holding that a state may impose conditions upon the United States' appropriation of water so long as the condition actually imposed is not inconsistent with other congressional directives).

5 Quigley v. Birdseye, 11 Mont. 439, 28 P. 741 (1892).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 359. Public authorization and regulation

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1556, 1568, 1610 to 1620

Forms

Am. Jur. Legal Forms 2d §§ 260:30, 260:32 (Application for permit to appropriate water; permit)
Am. Jur. Pleading and Practice Forms, Waters § 13 (Application for permission to appropriate water)
Am. Jur. Pleading and Practice Forms, Waters § 16 (Protest of application for permission to appropriate water)
Am. Jur. Pleading and Practice Forms, Waters § 17 (Permit to appropriate water)
Am. Jur. Pleading and Practice Forms, Waters §§ 18, 19 (Complaint, petition, or declaration—To compel issuance of appropriation permit)

In several states, the public ownership of bodies of water therein, along with the attendant right of individuals to make appropriations of such water, is expressly asserted by either constitutional or statutory provisions.[1] Every state is free to change its laws governing rights in respect to its natural watercourses and to permit the appropriation of flowing water for such purposes as it may deem wise.[2] Such constitutional or statutory declarations are valid and effective in so far as they do not conflict with the paramount authority of the federal government in respect to the control of navigable waters.[3] Further, such provisions are not permitted to operate to the impairment or destruction of vested rights.[4] In some cases, the view has been taken that all riparian rights which have vested prior to the adoption of a provision asserting title to the waters of a state remain unimpaired although they are not expressly reserved.[5]

Subject to guaranties for the protection of property rights, the public authority, under the police power, may enact and enforce reasonable regulations with respect to the exercise of the right of appropriation.[6] The matter may be placed within the control of an administrative board or commission.[7] Indeed, under some state statutory schemes, a state agency or board is given expansive powers to safeguard the state's scarce water resources, and these considerations mean that any use other than those excepted by statute for riparian rights and those rights which had been otherwise appropriated prior to the effective date of the controlling statute is conditioned upon compliance with the statutory appropriation procedures.[8]

Observation:

Congress has enacted legislation recognizing and sanctioning local laws and customs as to the appropriation of waters on the public lands.[9] For example, after the enactment of the Desert Land Act of 1877,[10] if not before, all nonnavigable waters in any part of the public domain became subject to the plenary control of the designated states, including those thereafter created out of the territories named, with the right in each to determine for itself to what extent the law of appropriation or the common-law rule in respect to riparian rights should apply, the act not binding the states to any policy, but recognizing and giving sanction, as regards the United States and its future grantees, to the state and local doctrine of appropriation.[11]

CUMULATIVE SUPPLEMENT

Cases:

A minimum flow is an appropriation subject to the same protection from subsequent appropriators as other water rights, and denial of an application where existing rights would be impaired is statutorily mandated. West's RCWA 90.03.290. Foster v. Washington State Dept. of Ecology, 184 Wash. 2d 465, 362 P.3d 959 (2015).

A minimum flow set by rule is an existing water right that generally may not be impaired by subsequent withdrawal or diversion of water from a river or stream, and statutory exception in cases where overriding considerations of the public interest will be served is a narrow one, not a device for wide-ranging reweighing or reallocation of water through water reservations for numerous future beneficial uses. West's RCWA 90.03.345, 90.54.020(3)(a). Swinomish Indian Tribal Community v. Washington State Dept. of Ecology, 311 P.3d 6 (Wash. 2013).

[END OF SUPPLEMENT]

Footnotes

1 Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969) (disapproved of on other grounds by, Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007)).

The right to appropriate unappropriated water is guaranteed by the state constitution. Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

The water rights determination and administration act provides the statutory framework for implementing the constitutional right to divert the unappropriated waters of any natural stream to beneficial uses. Gallegos v. Colorado Ground Water Com'n, 147 P.3d 20 (Colo. 2006), as modified without opinion on denial of reh'g, (Dec. 4, 2006).

2 State of Connecticut v. Com. of Mass., 282 U.S. 660, 51 S. Ct. 286, 75 L. Ed. 602 (1931).

3 U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899).

4 Fall River Valley Irr. Dist. v. Mt. Shasta Power Corp., 202 Cal. 56, 259 P. 444, 56 A.L.R. 264 (1927).

5 Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905).

6 Fallbrook Irr. Dist. v. Bradley, 164 U.S. 112, 17 S. Ct. 56, 41 L. Ed. 369 (1896); Gutierrez v. Middle Rio Grande Conservancy Dist., 34 N.M. 346, 282 P. 1, 70 A.L.R. 1261 (1929).

Property rights granted to an appropriator of water, by an appropriation permit, are subject to regulation and supervision by the state, by virtue of its police power. Keating v. Nebraska Public Power Dist., 713 F. Supp. 2d 849 (D. Neb. 2010), aff'd, 660 F.3d 1014 (8th Cir. 2011).

7 Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S. Ct. 637, 60 L. Ed. 1084 (1916); Edwards Aquifer Authority v. Day, 274 S.W.3d 742 (Tex. App. San Antonio 2008), judgment aff'd, 369 S.W.3d 814 (Tex. 2012).

8 People v. Shirokow, 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859 (1980).

9 Krieger v. Pacific Gas & Electric Co., 119 Cal. App. 3d 137, 173 Cal. Rptr. 751 (3d Dist. 1981) (holding that the statute, 43 U.S.C.A. § 661, protecting the possessors and owners of vested water rights on public lands, confers upon the appropriators of waters on public lands easements for their ditches when the public lands through which the ditches run pass into private ownership).

10 43 U.S.C.A. §§ 321 to 339.

11 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

The Desert Land Act simply made the appropriation doctrine generally applicable to the waters of the West, limited the settlers' water rights to that which they had actually appropriated and used, and declared all surplus water to be free for appropriation by the public. In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988).

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V. Acquisition of Water and Water Rights

A. Appropriation

1. In General

§ 360. Public authorization and regulation—Reserved water rights doctrine

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1556, 1568, 1610, 1621

Under the reserved water rights doctrine, in withdrawing land from the public domain and reserving it for a federal purpose, the United States acquires a reserved right in unappropriated water to the extent needed to accomplish the purpose of the reservation.[1] Under the doctrine, the United States, as a result of its setting aside a national forest, is entitled to the reserved water rights in a river in the forest to the extent necessary to preserve the timber or to secure favorable water flows in the forest, but the United States' reserved water rights do not include the rights to the use of the river for purposes of recreation, aesthetics, wildlife-preservation, or cattle grazing.[2]

Observation:

No federal water rights were reserved by the passage of the Federal Land Policy and Management Act of 1976[3] since the Act does not withdraw land from the public domain but merely sets forth the purposes, goals, and authority for use of the public domain.[4]

Footnotes

1 §§ 13, 16.

2 U. S. v. New Mexico, 438 U.S. 696, 98 S. Ct. 3012, 57 L. Ed. 2d 1052 (1978) (holding that 16 U.S.C.A. § 475, governing the purposes for which national forests could be established, only included timber preservation and the securing of favorable water flows as valid purposes for which water rights in national forests could be reserved).

3 43 U.S.C.A. §§ 1701 to 1787.

4 Sierra Club v. Watt, 659 F.2d 203 (D.C. Cir. 1981).

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A. Appropriation

1. In General

§ 361. What law governs

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1555

The appropriation of water rights generally is a matter of state law[1] even when those rights are developed in land owned by the federal government.[2] The local law of a state in force at the time of the appropriation thus ordinarily governs rights with respect to the appropriation of water.[3] In some cases, however, the law of a foreign granting sovereign will govern the appropriation of water rights.[4]

Federal law defers to state appropriation laws in determining the right of the United States to appropriate water within a state.[5] Specifically, the Reclamation Act of 1902[6] requires federal agencies desiring to appropriate intrastate waters to abide by state laws having dominion and control over those waters, including procedural law, and therefore, the United States is subject to a state statute of limitations as to the review of a state water agency's decision.[7]

Footnotes

1 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).

2 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008).

3 California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 55 S. Ct. 725, 79 L. Ed. 1356 (1935).

4 In re Contests of City of Laredo, to Adjudication of Water Rights in Middle Rio Grande Basin and Contributing Texas Tributaries, 675 S.W.2d 257 (Tex. App. Austin 1984), writ refused n.r.e., (Nov. 28, 1984).

5 Northport Irr. Dist. v. Jess, 215 Neb. 152, 337 N.W.2d 733 (1983).

6 43 U.S.C.A. §§ 371 to 573.

7 U.S. v. State of Cal., 529 F. Supp. 303 (E.D. Cal. 1981).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

a. In General

§ 362. Required elements, generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1571 to 1574, 1576

Generally, to constitute a valid appropriation of water there must be an intent to appropriate water[1] and apply it to a beneficial use,[2] as well as the actual diversion of the water from its natural channel or other source of supply,[3] or in other words, a taking of the water,[4] and the application of the water to a beneficial use[5] within a reasonable time.[6] If any of the requisite elements are missing, such as the intent to apply the water to a beneficial use,[7] or the diversion of the water,[8] there is no appropriation and no water rights obtained.

The want of reasonable diligence either in consummating the diversion of the water or in the application of the water to a beneficial use is fatal to an appropriation.[9] The diligence required is that constancy or steadiness of purpose or labor which is usual with people engaged in like enterprises and who desire a speedy accomplishment of their designs and such assiduity in the prosecution of the enterprise as will manifest to the world a bona fide intention to complete it within a reasonable time.[10] No allowance generally is to be made for conditions peculiar to the appropriator, and delays which are due to a personal inability to accomplish his or her intentions cannot be excused.[11]

CUMULATIVE SUPPLEMENT

Cases:

Ranch operator was not entitled to a conditional water storage right for reservoir in the absence of evidence that the requested water could be stored and that the reservoir projects would be completed with diligence and within a reasonable time; operator presented no evidence regarding a timeline for construction, the costs of construction and land acquisition, the ability to finance the costs, the status of necessary permits or government approvals, or the technical feasibility, design, or construction of the reservoirs, and it offered no evidence to rebut the economic and technical feasibility issues raised by objector. Colo. Rev. Stat. Ann. § 37-92-305(9)(b) Application for Water Rights, 2013 CO 41, 307 P.3d 1056 (Colo. 2013).

[END OF SUPPLEMENT]

Footnotes

1 Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Com'rs, 44 P.3d 1019 (Colo. 2002), as modified without opinion on denial of reh'g, (Apr. 29, 2002).

2 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949).
As to intent, see § 363.
As to beneficial use, generally, see § 365.

3 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949).
As to actual diversion, generally, see § 367.

4 In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Com'rs, 44 P.3d 1019 (Colo. 2002), as modified without opinion on denial of reh'g, (Apr. 29, 2002).

5 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); In re Concerning Application for Plan for Augmentation of City and County of Denver ex rel. Bd. of Water Com'rs, 44 P.3d 1019 (Colo. 2002), as modified without opinion on denial of reh'g, (Apr. 29, 2002); In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

6 Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law); Turlock Irr. Dist. v. Zanker, 140 Cal. App. 4th 1047, 45 Cal. Rptr. 3d 167 (5th Dist. 2006); Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949).

7 Maeris v. Bicknell, 7 Cal. 261, 1857 WL 703 (1857).

8 In re SRBA, 149 Idaho 532, 237 P.3d 1 (2010); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).

9 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936); Tanner v. Provo Reservoir Co., 99 Utah 139, 98 P.2d 695 (1940).

10 Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896).

11 Ophir Silver Min. Co. v. Carpenter, 4 Nev. 534, 1868 WL 2014 (1868).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

a. In General

§ 363. Intent

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1572

A valid appropriation of water requires an intent to appropriate the water and apply it to a beneficial use.[1] The intent to appropriate water requires a fixed purpose to pursue diligently a certain course of action to take and beneficially use water from a particular source.[2] The intent must be relatively specific regarding the amount of water to be appropriated, its place of diversion, and its type of beneficial use.[3] A diversion of water is sufficient to prove the intent to appropriate water.[4]

Footnotes

1 § 362.

2 In re Vought, 76 P.3d 906 (Colo. 2003).

3 In re Vought, 76 P.3d 906 (Colo. 2003).

4 In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

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A. Appropriation

2. Elements and Requisites of Appropriation

a. In General

§ 364. Notice

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1575

Forms

Am. Jur. Legal Forms 2d § 260:31 (Notice of appropriation of water)
Am. Jur. Pleading and Practice Forms, Waters §§ 14, 15 (Notice of application for permission to appropriate water; notice of appropriation of water)

In some jurisdictions, statutes require persons intending to appropriate the waters of a stream, or a part thereof, to give warning of their intention by posting at or near the intended point of diversion a signed notice of their intention, stating the amount of water intended to be appropriated, the place and means of diversion, the use or uses for which the water is desired, and the place where it is to be used, and a designation of the general route of the ditch or canal by which it is to be carried.[1] In the absence of a statute specifically requiring it, however, such a notice is not indispensable to the valid appropriation of water.[2] Notice is intended merely as the first act toward appropriation, to which the appropriation, when completed with reasonable diligence, will relate and will become paramount to the rights of such persons as will subsequently undertake to make an appropriation of the waters of the same stream.[3]

Footnotes

1 Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 (1899); Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896).

2 Union Mill & Mining Co. v. Dangberg, 81 F. 73 (C.C.D. Nev. 1897); Wells v. Kreyenhagen, 117 Cal. 329, 49 P. 128 (1897).

3 Nevada Ditch Co. v. Bennett, 30 Or. 59, 45 P. 472 (1896).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

b. Application and Beneficial Use

§ 365. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1574

Forms

Am. Jur. Pleading and Practice Forms, Waters § 43 (Answer—Defense—Invalidity of prior appropriation—Water not applied to beneficial use)

A valid appropriation of water requires the application of water to a beneficial use,[1] and a water right arises only by actually placing or applying the water to a beneficial use.[2] An appropriative water right is thus established by beneficial use,[3] which forms the basis of the right to the use of the water.[4]

A beneficial use, for purposes of the right to appropriate water, is not limited to a use that generates a profit, or even income.[5] Indeed, the particular purpose for which water is appropriated and used is not material provided that it is for some useful industry or to supply a well-recognized want.[6] It may be to aid in mining operations,[7] to operate mills or machinery or to generate electricity,[8] to irrigate lands,[9] to supply water to quench the thirst of people and animals,[10] to extinguish fires,[11] or to serve any other useful purpose,[12] such as flood control.[13] Beneficial use, however, is more than use alone, and a diversion of water merely to serve purposes of speculation or monopoly will not constitute a beneficial use.[14]

Ordinarily, one beneficial use, for purposes of the right to appropriate water, is not to be preferred to another, although in some jurisdictions, by virtue of constitutional or statutory provision, preference is given to uses for certain purposes.[15]

CUMULATIVE SUPPLEMENT

Cases:

Every water right decree contains the implied condition of beneficial use. Concerning Application for Water Rights of Sedalia Water and Sanitation District in Douglas County, 2015 CO 8, 343 P.3d 16 (Colo. 2015).

The focus on beneficial use in a proceeding to change a water right complements Colorado's concomitant rule of preventing injury to others with vested water rights. Widefield Water and Sanitation District v. Witte, 2014 CO 81, 340 P.3d 1118 (Colo. 2014).

A correct and complete application for a permit to appropriate water does not mean that the permit will be granted; the applicant still must show by a preponderance of the evidence that the statutory criteria for a permit are met. Mont. Code Ann. § 85-2-311. Flathead Lakers Inc. v. Montana Department of Natural Resources and Conservation, 2020 MT 132, 464 P.3d 396 (Mont. 2020).

Nonprofit mutual irrigation company's corporate restrictions on transferability of its shares was not incompatible with the beneficial use element of state water law; doctrine of beneficial use encompassed no hierarchy of beneficial uses, such that purported purchaser of shares had no viable claim to a preference for the free alienability of the shares of the company. Southam v. South Despain Ditch Co., 2014 UT 35, 337 P.3d 236 (Utah 2014).

"Beneficial use" is a term of art having two specialized meanings in water law, and refers to both the type of use and the measure and limit of the water right. Swinomish Indian Tribal Community v. Washington State Dept. of Ecology, 311 P.3d 6 (Wash. 2013).

[END OF SUPPLEMENT]

Footnotes

1 § 362.

2 In re Vought, 76 P.3d 906 (Colo. 2003); U.S. v. Pioneer Irr. Dist., 144 Idaho 106, 157 P.3d 600 (2007).
The sine qua non of making a valid appropriation is to apply the water attempted to be appropriated to some beneficial use. In re Uintah Basin, 2006 UT 19, 133 P.3d 410 (Utah 2006).

3 Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).

4 High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist., 120 P.3d 710 (Colo. 2005), as modified without opinion on denial of reh'g, (Oct. 11, 2005); Bacher v. Office of State Engineer of State of Nevada, 122 Nev. 1110, 146 P.3d 793 (2006); Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).
Beneficial use is the foundation of an appropriative right to water. Fort Vannoy Irr. Dist. v. Water Resources Com'n, 345 Or. 56, 188 P.3d 277 (2008).

5 Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011).

6 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874); Hammond v. Rose, 11 Colo. 524, 19 P. 466 (1888).

7 Am. Jur. 2d, Mines and Minerals § 335.

8 Salt Lake City v. Salt Lake City Water & Elec. Power Co., 24 Utah 249, 67 P. 672 (1902), aff'd, 25 Utah 456, 71 P. 1069 (1903).

9 Am. Jur. 2d, Irrigation § 24.

10 Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 (1898).

11 Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 (1898).

12 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874).
The preservation of water in an area described for its scenic beauty and recreational purposes necessary and desirable for all citizens of the state is a beneficial use of the water. State, Dept. of Parks v. Idaho Dept. of Water Administration, 96 Idaho 440, 530 P.2d 924 (1974).

13 Board of County Com'rs of County of Arapahoe v. Crystal Creek Homeowners Ass'n, 14 P.3d 325 (Colo. 2000), as modified without opinion on denial of reh'g, (Dec. 18, 2000).

14 In re General Determination of Rights to Use All of Water, Both Surface and Underground, Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties, 2004 UT 67, 98 P.3d 1 (Utah 2004).

15 Brummund v. Vogel, 184 Neb. 415, 168 N.W.2d 24 (1969) (disapproved of on other grounds by, Koch v. Aupperle, 274 Neb. 52, 737 N.W.2d 869 (2007)).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

b. Application and Beneficial Use

§ 366. Change of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1600, 1601

An appropriator of water is not limited in his or her application to the original use of such water.[1] An appropriator has the right to change the use of his or her water right[2] and ordinarily may apply the water to any beneficial use that he or she chooses.[3] In changing from one use to another, an appropriator does not in any way lessen his or her rights or forfeit priority as an appropriator.[4] It is not necessary for an appropriator to show that the use originally contemplated has become impracticable or unprofitable since the appropriator and any successors in interest acquire the right to use the water thus actually appropriated, either for the purpose originally contemplated or for any other lawful purpose.[5]

An appropriator's right to change the use of his or her water right is not absolute,[6] and it must be balanced against the competing interests of other holders of vested water rights, including their right to the continuation of stream conditions as they existed at the time they first made their appropriation.[7] The appropriator cannot make a change of use an excuse for enlarging the appropriation to the injury of others.[8] An appropriator may be required to file an application for a change of use of water rights with the proper authorities and obtain approval prior to making such change of use.[9]

CUMULATIVE SUPPLEMENT

Cases:

Water court's approval of mutual reservoir company change-of-use application with respect to water it diverted from river into closed basin, in order to use its water storage rights to replace depletions in river to prevent injury to surface water rights, did not undermine General Assembly's efforts to manage the surface and groundwater systems in valley, where company's purpose in filing application was to provide a source of water to subdistrict of water conservation district to help ensure the successful effectuation of subdistrict's water management plan, which was critical to promoting long-term aquifersustainability, and proposed change was also triggered by desire to support subdistrict's efforts to maintain hydraulic divide and protect senior water rights in closed basin. Colo. Rev. Stat. Ann. §§ 37-48-126, 37-92-501(4)(a)(I). Santa Maria Reservoir Company v. Warner, 2020 CO 27, 461 P.3d 478 (Colo. 2020).

County failed to satisfy its burden to prove that 101 acres claimed in its analysis of historical consumptive use, which consisted of two parcels of 31 acres and 70 acres, were in fact historically irrigated with water from inches appropriated to farm, as required to support application for change of use of farm's water rights from irrigation to augmentation of ponds, despite contention that 101 acres fell within lawful place of use of water right; even though aerial photographs of 70-acre parcel showed irrigation, past owners of 70-acre parcel did not make statements regarding irrigation practices, photographs did not show source of water, and contention that 101 acres were within lawful place of use did not automatically establish that right was actually used on that land over time. Concerning the Application for Water Rights of County of Boulder in Boulder County v. Boulder and Weld County Ditch Company, 2016 CO 17, 367 P.3d 1179 (Colo. 2016).

One must own a water right in order to change it. Colo. Rev. Stat. Ann. § 37-92-103(12). East Cherry Creek Valley Water and Sanitation District v. Greeley Irrigation Company, 2015 CO 30M, 348 P.3d 434 (Colo. 2015), as modified on denial of reh'g, (June 1, 2015).

Only the owner of a decreed water right may seek changes to that decree. Concerning the Application for Water Rights of Tidd, 2015 CO 39, 349 P.3d 259 (Colo. 2015).

Basic principles concerning a change of water right anchor their roots in long-standing water law, which provides that: (1) the extent of beneficial use of the original appropriation limits the amount of water that can be changed to another use, and (2) the change must not injure other water rights. Concerning Application for Water Rights of Sedalia Water and Sanitation District in Douglas County, 2015 CO 8, 343 P.3d 16 (Colo. 2015).

[END OF SUPPLEMENT]

Footnotes

1 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

2 City of Englewood v. Burlington Ditch, Reservoir and Land Co., 235 P.3d 1061 (Colo. 2010).
An appropriator may increase his or her consumption by changing to a more water-intensive crop so long as he or she makes no change in the acreage irrigated or the amount of water diverted. Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011).

3 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

4 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

5 In re Water Rights in Alpowa Creek in Garfield and Asotin Counties, 129 Wash. 9, 224 P. 29 (1924).

6 City of Englewood v. Burlington Ditch, Reservoir and Land Co., 235 P.3d 1061 (Colo. 2010).

7 City of Englewood v. Burlington Ditch, Reservoir and Land Co., 235 P.3d 1061 (Colo. 2010).

8 Smith v. Duff, 39 Mont. 382, 102 P. 984 (1909).
A change in the use of a water right cannot effect an enlargement in the use of that right. Farmers Reservoir and Irr. Co. v. City of Golden, 44 P.3d 241 (Colo. 2002).

9 Santa Fe Trail Ranches Property Owners Ass'n v. Simpson, 990 P.2d 46 (Colo. 1999); Hohenlohe v. State, Dept. of Natural Resources and Conservation, 2010 MT 203, 357 Mont. 438, 240 P.3d 628 (2010); R.D. Merrill Co. v. State, Pollution Control Hearings Bd., 137 Wash. 2d 118, 969 P.2d 458 (1999).

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V. Acquisition of Water and Water Rights

A. Appropriation

2. Elements and Requisites of Appropriation

c. Diversion

§ 367. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1573

A valid appropriation of water ordinarily requires the actual diversion of the water from its natural channel or other source of supply.[1] An actual diversion of water, however, has been held to not be a requisite element of a water appropriation when it is not a physical necessity for the application of the water to a beneficial use.[2] An actual diversion, under some authority, is not needed when water is appropriated for stock watering,[3] or fish, wildlife and recreation,[4] or when a state entity acts pursuant to statute and makes nondiversionary appropriations for the beneficial use of the state's citizens.[5] A physical diversion of water also may not be necessary to appropriate instream water rights.[6]

Footnotes

1 § 362.

2 In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

3 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

4 In re Adjudication of the Existing Rights to the Use of All the Water, 2002 MT 216, 311 Mont. 327, 55 P.3d 396 (2002).

5 State v. U.S., 134 Idaho 106, 996 P.2d 806 (2000).

6 Phelps Dodge Corp. v. Arizona Dept. of Water Resources, 211 Ariz. 146, 118 P.3d 1110 (Ct. App. Div. 1 2005).

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c. Diversion

§ 368. Change in point of diversion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1573, 1600

Forms

Am. Jur. Pleading and Practice Forms, Waters § 26 (Protest—Before state water agency—Against change in point of diversion and use of water)

Incident to an appropriative water right is the right to change the point of diversion of the water,[1] to the extent that it neither enlarges the right nor injuriously affects other users.[2] An appropriator of water from a stream thus may change the point of diversion without affecting his or her right of priority so long as the rights of others are not thereby injuriously affected.[3] Conversely, such a change cannot lawfully be made where the rights of other persons would be injured thereby.[4] An appropriator may be required to file an application for a change in the point of diversion with the appropriate authorities and obtain approval prior to making such a change.[5]

Footnotes

1 Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources, 91 P.3d 1058 (Colo. 2004); Herrington v. State of N.M. ex rel. Office of State Engineer, 2006-NMSC-014, 139 N.M. 368, 133 P.3d 258 (2006).

2 Trail's End Ranch, L.L.C. v. Colorado Div. of Water Resources, 91 P.3d 1058 (Colo. 2004).

3 State of Wyo. v. State of Colo., 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 (1936).

4 Hague v. Nephi Irr. Co., 16 Utah 421, 52 P. 765 (1898).

5 In re Revised Abandonment List of Water Rights in Water Div. 2, 2012 CO 35, 276 P.3d 571 (Colo. 2012).

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2. Elements and Requisites of Appropriation

c. Diversion

§ 369. Mode and means

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1573

Where the other essential requisites of a valid appropriation exist,[1] the method of diverting or carrying the water is immaterial so long as it is lawful.[2] The method employed must, however, be reasonably efficient for the purpose[3] so as to avoid unnecessary waste to the injury of the rights of other users.[4]

An appropriator may change the method or means of diversion from time to time as convenience or necessities may require,[5] subject to the limitation that the existing rights of other persons must not be injured or materially interfered with.[6]

Footnotes

1 As the elements of appropriation, generally, see § 362.

2 Clausen v. Armington, 123 Mont. 1, 212 P.2d 440 (1949); Simmons v. Winters, 21 Or. 35, 27 P. 7 (1891).

3 State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County, 108 Mont. 89, 88 P.2d 23, 121 A.L.R. 1031 (1939).

4 § 371.

5 Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 P. 22 (1904).

6 Nevada Water Co. v. Powell, 34 Cal. 109, 1867 WL 780 (1867).

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A. Appropriation

3. Nature, Incidents, and Extent of Right

§ 370. Nature and incidents of right

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1589

Under the appropriation doctrine governing water law, the right to use water is considered a property right[1] or real property interest.[2] Specifically, the right of an appropriator to the use of the water of a stream, in the absence of statutory or constitutional provisions existing at the time of its acquisition qualifying it, is a property right of which he or she cannot be deprived without compensation[3] and which is invested with the usual incidents of property rights in general, including the right of sale and transfer.[4] However, while an appropriator of the water of a natural stream secures a property right therein, he or she does not acquire title to the running water, at least, not prior to the actual diversion thereof,[5] unless he or she is entitled to take and use all of the water of the stream.[6] Hence, an appropriator of water does not own the corpus of the water[7] but only its use.[8] A right of appropriation of surface water is not one of ownership of surface water prior to capture.[9]

Under some authority, the right to take water from the land of another by appropriation has been characterized as an easement in gross, which may or may not, according to the circumstances, be appurtenant to the land on which the water is used.[10]

CUMULATIVE SUPPLEMENT

Cases:

Appropriative right to extract groundwater consists of a right to extract water for beneficial use on any land to which appropriator may choose to conduct it. Great Oaks Water Company v. Santa Clara Valley Water District, 239 Cal. App. 4th 456, 191 Cal. Rptr. 3d 352 (6th Dist. 2015).

Property rights in water are unique in that they are usufructuary; ownership of the resource remains in the public, and a right to use water exists within the limitations of Colorado's prior appropriation doctrine. Colo. Const. art. 16, § 5; Colo. Rev. Stat. Ann. § 37-92-103(12). East Cherry Creek Valley Water and Sanitation District v. Greeley Irrigation Company, 2015 CO 30M, 348 P.3d 434 (Colo. 2015), as modified on denial of reh'g, (June 1, 2015).

Director of Idaho Department of Water Resources properly concluded that, notwithstanding fish propagation operator's historical use, operator was not entitled to divert water from entirety of spring complex, which stretched over at least two 10-acre tracts, where director had concluded that point of diversion and source elements of operator's water right partial decrees were unambiguous, and limited operator to diverting water only from certain points within decreed 10-acre tract. West's I.C.A. § 42–1420. Rangen, Inc. v. Idaho Dept. of Water Resources, 367 P.3d 193 (Idaho 2016).

Even when a water right is held by a party, it is not owned in the usual sense; rather, a water right is a usufructory right, that is, a right to make use of the water, rather than a physical ownership right. Elk Grove Development Company v. Four Corners County Water and Sewer District, 2020 MT 195, 469 P.3d 153 (Mont. 2020).

Irrigation company prosecuted construction of reservoir and canal system with due diligence until its completion, as required for company's notice of appropriation, which claimed 3,000 cubic feet per second (cfs) from river for the purposes of irrigating and reclaiming lands in county, to be valid appropriation under Montana's 1885 Appropriation Act; after filing the notice, company's predecessors continued to develop the system despite construction and design issues, although system was sufficiently developed to divert some water before project was completed, any water delivery constituted fraction of eventual capacity of the system, and company continued to develop and improve the system until it could divert and store water as contemplated by the notice. Teton Cooperative Reservoir Company, 2018 MT 66, 414 P.3d 1249 (Mont. 2018).

Under Due Process Clause, those who protest an application to appropriate or change existing water rights must have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which state engineer's decision may be based; this necessarily means that the opportunity to challenge the evidence must be given before the state engineer grants proposed use or change applications. U.S.C.A. Const.Amend. 14; West's NRSA 533.365(5). Eureka Cnty v. State Engineer, 359 P.3d 1114, 131 Nev. Adv. Op. No. 84 (Nev. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).
A vested water right fixed and established by appropriation is a right which is regarded and protected as property. Hage v. U.S., 51 Fed. Cl. 570 (2002) (applying Nevada law).
Use rights to waters of a natural stream, including tributary ground water, become perfected property rights when an appropriator places the water to actual beneficial use. High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist., 120 P.3d 710 (Colo. 2005), as modified without opinion on denial of reh'g, (Oct. 11, 2005).

2 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).

3 San Jose Land & Water Co. v. San Jose Ranch Co., 189 U.S. 177, 23 S. Ct. 487, 47 L. Ed. 765 (1903); McGowan v. U.S., 206 F. Supp. 439 (D. Mont. 1962) (applying law of Montana).

4 State of Wyo. v. State of Colo., 298 U.S. 573, 56 S. Ct. 912, 80 L. Ed. 1339 (1936).
Under the prior appropriation doctrine, as a separate protected property right, a vested water right can be sold, leased, or transferred. Walker v. U.S., 2007-NMSC-038, 142 N.M. 45, 162 P.3d 882 (2007).

5 Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 (1892); Johnston v. Little Horse Creek Irr. Co., 13 Wyo. 208, 79 P. 22 (1904).

6 Saint v. Guerrerio, 17 Colo. 448, 30 P. 335 (1892); Salt Lake City v. Salt Lake City Water & Elec. Power Co., 24 Utah 249, 67 P. 672 (1902), aff'd, 25 Utah 456, 71 P. 1069 (1903).

7 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013); Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645 (Colo. 2011), as modified without opinion on denial of reh'g, (June 20, 2011); Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1933); Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).

8 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013); Burlington Ditch Reservoir and Land Co. v. Metro Wastewater Reclamation Dist., 256 P.3d 645 (Colo. 2011), as modified without opinion on denial of reh'g, (June 20, 2011); Rock Creek Ditch & Flume Co. v. Miller, 93 Mont. 248, 17 P.2d 1074, 89 A.L.R. 200 (1933); Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).

9 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

10 Smith v. Denniff, 24 Mont. 20, 60 P. 398 (1900).

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3. Nature, Incidents, and Extent of Right

§ 371. Extent of right; quantity of water

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1593(1) to 1593(6)

Water rights, under the doctrine of appropriation, are measured and limited by beneficial use.[1] The first person who makes a valid appropriation of water becomes the owner of a right to the quantity of water put to beneficial use.[2] The extent of the right gained,[3] as well as the water user's appropriations,[4] are limited to the amount of water applied or put to a beneficial use, meaning the amount actually used and reasonably necessary for a useful purpose to which the water has been applied.[5] Thus, the right to take water by prior appropriation is limited in every case in quantity to the extent to which an actual appropriation is necessary for the uses to which it is put.[6]

If the waters of a natural stream have been appropriated according to law, and put to a beneficial use, the rights thus acquired carry with them an interest in the stream from the points where the waters are diverted to the source from which the supply is obtained, and any interference with the stream by a person having no interest or superior right therein, to the damage of the appropriator, is unlawful and actionable.[7]

An appropriator of water must exercise his or her water rights with due regard for the rights of the public[8] and so as to cause no unnecessary injury to subsequent appropriators.[9] The use of water must be made without waste,[10] and an appropriation will not be sustained in the wasteful use of the water.[11] An appropriator of water who is not applying water to a beneficial purpose cannot exclude others from using it.[12]

CUMULATIVE SUPPLEMENT

Cases:

An appropriator who diverts water in excess of the appropriator's actual requirements and allows the excess to go to waste acquires no right to the excess; the same is true for water diverted in excess of reasonable requirements and used inefficiently. West's U.C.A. § 73–1–3. Delta Canal Co. v. Frank Vincent Family Ranch, LC, 2013 UT 54, 321 P.3d 1027 (Utah 2013).

[END OF SUPPLEMENT]

Footnotes

1 High Plains A & M, LLC v. Southeastern Colorado Water Conservancy Dist., 120 P.3d 710 (Colo. 2005), as modified without opinion on denial of reh'g, (Oct. 11, 2005); Bacher v. Office of State Engineer of State of Nevada, 122 Nev. 1110, 146 P.3d 793 (2006); Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, 289 P.3d 1232 (N.M. 2012).

2 Stockton East Water Dist. v. U.S., 583 F.3d 1344 (Fed. Cir. 2009), on reh'g in part on other grounds, 638 F.3d 781 (Fed. Cir. 2011).

3 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008); Lummi Indian Nation v. State, 170 Wash. 2d 247, 241 P.3d 1220 (2010).
Under the doctrine of appropriation, the scope of the right to the use of water is limited by the concept of beneficial use. Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011).

4 In re General Determination of Rights to Use All of Water, Both Surface and Underground, Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties, 2004 UT 67, 98 P.3d 1 (Utah 2004).

5 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).
Absolute water rights are limited to an amount sufficient for the purpose for which the appropriation was made. In re Water Rights of Central Colorado Water Conservancy Dist., 147 P.3d 9 (Colo. 2006).

6 Leavitt v. Lassen Irr. Co., 157 Cal. 82, 106 P. 404 (1909).
Although a landowner had a superior right under the state appropriation statutes by having filed first, his right was limited to such quantity of water as was reasonably sufficient and necessary to irrigate the land susceptible of irrigation on either side of a ditch or canal. Bartley v. Sone, 527 S.W.2d 754 (Tex. Civ. App. San Antonio 1974), writ refused n.r.e., (Dec. 31, 1975).

7 Cole v. Richards Irr. Co., 27 Utah 205, 75 P. 376 (1904).

8 U. S. v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 19 S. Ct. 770, 43 L. Ed. 1136 (1899).

9 Vineland Irr. Dist. v. Azusa Irr. Co., 126 Cal. 486, 58 P. 1057 (1899).

10 In re Application for Water Rights in Rio Grande County, 53 P.3d 1165 (Colo. 2002); Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

11 Town of Sterling v. Pawnee Ditch Extension Co., 42 Colo. 421, 94 P. 339 (1908); Miller v. Wheeler, 54 Wash. 429, 103 P. 641 (1909).

12 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

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A. Appropriation

4. Priorities and Conflicts

§ 372. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1579 to 1581

Forms

Am. Jur. Pleading and Practice Forms, Waters § 23 (Complaint, petition, or declaration—For declaration of priority between junior domestic appropriator and senior agricultural appropriator)

Am. Jur. Pleading and Practice Forms, Waters § 35 (Complaint, petition, or declaration—Allegation—Diversion of excessive quantity of water by senior appropriator)

Am. Jur. Pleading and Practice Forms, Waters § 55 (Judgment or decree—Provision—Limiting use of water to amount needed regardless of entitlement)

Priority of right is the essence of the appropriation doctrine.[1] Under the doctrine, as between persons claiming water by appropriation, the first person to divert unappropriated water and to apply it to a beneficial use has a water right superior to subsequent appropriators from the same water resource,[2] or in other words, the person first in time is first in right.[3] When the flow of a watercourse is insufficient to satisfy all appropriative claims, each claim is entitled to its full appropriation before the next junior claimant becomes entitled to any water.[4] A senior appropriator thus is guaranteed the full measure of his or her appropriation before any claim by a junior appropriator may be satisfied,[5] and those with inferior rights may be left without water.[6]

While a diversion of water ripens into a valid appropriation only when the water is used by the appropriator,[7] the right of the prior appropriator takes effect by relation to the commencement of his or her work if it is prosecuted to completion with reasonable diligence.[8] If the work is not prosecuted with diligence, however, the right does not so relate, dating, in such case, only from the time when the work was completed or the appropriation fully perfected.[9] An appropriation does not take priority by relation as to a time anterior to the existence of a fixed and definite purpose to take it up and carry it through.[10] There also ordinarily can be no tacking of a junior right to a prior right with the resulting elimination of an intermediate claim.[11]

Observation:

In certain jurisdictions, pursuant to constitutional provisions, certain water uses take preference over others, despite the appropriators' priority dates, and in times of water shortage, aggrieved water users with superior preference rights may exercise their constitutional preference to obtain relief when the prior-appropriation system would otherwise deny such users access to water.[12] In such cases, an appropriator of water having a superior preference right, but a junior appropriation right, can use the water to the detriment of a senior appropriator having an inferior preference right, but the junior appropriator must pay just compensation to the senior appropriator.[13]

Footnotes

1 El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

2 Kobobel v. State, Dept. of Natural Resources, 249 P.3d 1127 (Colo. 2011), cert. denied, 132 S. Ct. 252, 181 L. Ed. 2d 145 (2011).

3 Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist., 226 F.3d 1170 (10th Cir. 2000); West Maricopa Combine, Inc. v. Arizona Dept. of Water Resources, 200 Ariz. 400, 26 P.3d 1171 (Ct. App. Div. 1 2001); El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006); Archuleta v. Gomez, 140 P.3d 281 (Colo. App. 2006); Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011); Cochran v. State, Dept. of Agr., Div. of Water Resources, 291 Kan. 898, 249 P.3d 434 (2011); In re General Determination of Rights to the Use of Water, 2004 UT 106, 110 P.3d 666 (Utah 2004).

4 North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007).
When a stream has insufficient water to satisfy all appropriation rights on it, a senior appropriator has the right to continue diverting water against a junior appropriator when both appropriators are using the water for the same purpose. In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

5 Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011); Sanpete Water Conservancy Dist. v. Carbon Water Conservancy Dist., 226 F.3d 1170 (10th Cir. 2000).

6 U.S. v. City of Las Cruces, 289 F.3d 1170 (10th Cir. 2002).

7 § 362.

8 Bathgate v. Irvine, 126 Cal. 135, 58 P. 442 (1899); Colorado Water Conservation Bd. v. City of Central, 125 P.3d 424 (Colo. 2005).
If the application to beneficial use of water is made in proper time, it relates back and completes the appropriation as of the time when it was initiated. State ex rel. Martinez v. City of Las Vegas, 2004-NMSC-009, 135 N.M. 375, 89 P.3d 47 (2004).

9 Conger v. Weaver, 6 Cal. 548, 1856 WL 865 (1856).

10 State of Wyo. v. State of Colo., 286 U.S. 494, 52 S. Ct. 621, 76 L. Ed. 1245 (1932).

11 Windsor Reservoir & Canal Co. v. Hoffman Mill Co., 48 Colo. 82, 109 P. 422 (1910).

12 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

13 In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

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§ 373. Subsequent or junior appropriations

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1579

Forms

Am. Jur. Pleading and Practice Forms, Waters § 32 (Complaint, petition, or declaration—To enjoin diversion of water from tributaries of source of appropriated water)

The appropriation doctrine recognizes that two or more parties can obtain a right to use water from the same source,[1] and where both prior and subsequent appropriatory rights can be enjoyed without interference with or material impairment of each other, the enjoyment of both is allowed.[2] Accordingly, the residue after a prior appropriation may be appropriated by others out of the water of the same stream if there is no interference with the prior appropriator.[3] If the prior appropriation is only for certain days in the week, hours of the day, or parts of the year, others may appropriate the water for other days, hours, or seasons.[4]

Where the doctrine of prior appropriation is recognized as applicable to percolating waters,[5] the mere fact that a subsequent appropriation of the unappropriated residue would necessitate a change in the method or means of diversion used by the prior appropriator does not, of itself, preclude such subsequent appropriation.[6] A subsequent appropriator, however, may not lower the head pressure which has the effect of preventing a prior appropriator from continuing a beneficial use of underground waters.[7]

While a subsequent appropriator of water from a stream takes with notice of the conditions existing at the time of the appropriation,[8] he or she has a right to have the stream flow precisely as it did when located, and when the rights of the subsequent appropriator once attach, the prior appropriator cannot encroach upon them by extending his or her rights beyond the first appropriation.[9] Subject to the fulfillment of the existing rights of all senior users of the stream, junior users can prevent senior users from enlarging their rights to the junior users' detriment.[10]

Footnotes

1 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

2 Jennison v. Kirk, 98 U.S. 453, 25 L. Ed. 240, 1878 WL 18364 (1878).

3 City of Philadelphia v. Philadelphia Suburban Water Co., 309 Pa. 130, 163 A. 297 (1932).

4 Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 P. 331 (1898).

5 § 233.

6 Bower v. Moorman, 27 Idaho 162, 147 P. 496 (1915).

7 Current Creek Irr. Co. v. Andrews, 9 Utah 2d 324, 344 P.2d 528 (1959).

8 State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County, 108 Mont. 89, 88 P.2d 23, 121 A.L.R. 1031 (1939).

9 Nevada Water Co. v. Powell, 34 Cal. 109, 1867 WL 780 (1867).

10 Montana v. Wyoming, 131 S. Ct. 1765, 179 L. Ed. 2d 799 (2011).

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§ 374. As between riparian and appropriatory rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1586

A.L.R. Library

Right of riparian owner to continuation of periodic and seasonal overflows from stream, 20 A.L.R.2d 656

Forms

Am. Jur. Pleading and Practice Forms, Waters § 50 (Judgment or decree—Apportioning waters of stream between appropriator and riparian owner)

The doctrines of riparian rights and of prior appropriation may exist concurrently in the same state,[1] and to the extent that water is not presently being used by riparian proprietors under their riparian right, it is subject to appropriation and beneficial use by others.[2] In the case of a conflict between riparian and appropriation rights, however, the courts are not in agreement as to who has the superior right.[3] According to some courts, appropriation rights are subordinate to riparian rights[4] so that in times of shortage riparian proprietors are entitled to fulfill their needs before appropriators are entitled to any use of the water.[5] In such

jurisdictions, the riparian proprietor is entitled to an injunction against an appropriator's interference with present reasonable riparian uses.[6]

In other jurisdictions, appropriatory rights prevail over riparian rights to the extent that they are in conflict.[7] In still other jurisdictions, if there is a conflict between riparian and appropriatory rights, the right which was first to accrue or attach is superior.[8] In determining priority of rights between an appropriator and a government patentee claiming as a riparian proprietor, the right of the latter is held to relate back to the first steps he or she took which were necessary for the acquisition of the patent.[9]

Although riparian water rights may exist on federal lands located within a state, the Desert Land Act[10] subordinates the federal government's interests in those waters to the rights of subsequent appropriators recognized under state and local law.[11] However, the act's provisions subordinating water rights in public domain lands to the vested rights of appropriators established under state law has no effect on riparian rights in federally held reserved lands.[12]

Footnotes

1 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (law of California); In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988); Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), opinion modified on other grounds on reh'g, 180 Neb. 569, 144 N.W.2d 209 (1966).
As to riparian rights, generally, see §§ 33 to 54.

2 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying law of California); City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).

3 Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), opinion modified on other grounds on reh'g, 180 Neb. 569, 144 N.W.2d 209 (1966).

4 Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008).

5 El Dorado Irr. Dist. v. State Water Resources Control Bd., 142 Cal. App. 4th 937, 48 Cal. Rptr. 3d 468 (3d Dist. 2006).

6 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958) (applying law of California).

7 Hutchinson v. Watson Slough Ditch Co., 16 Idaho 484, 101 P. 1059 (1909).

8 Brosnan v. Harris, 39 Or. 148, 65 P. 867 (1901).

9 Sturr v. Beck, 133 U.S. 541, 10 S. Ct. 350, 33 L. Ed. 761 (1890); Benton v. Johncox, 17 Wash. 277, 49 P. 495 (1897).

10 43 U.S.C.A. §§ 321 to 339 (applicable to desert lands as defined in the act, and applicable in specified western states).
As to the reclamation of lands under the Desert Land Act, see Am. Jur. 2d, Irrigation §§ 95 to 105.

11 In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988).

12 In re Water of Hallett Creek Stream System, 44 Cal. 3d 448, 243 Cal. Rptr. 887, 749 P.2d 324 (1988).

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A. Appropriation

4. Priorities and Conflicts

§ 375. Appropriation of water in interstate stream

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1579

Rights as between appropriators from the same stream, but in different states, where the doctrine of prior appropriation prevails, are to be determined by the rule of priority in the time of the appropriation.[1] Appropriations from the same interstate stream in the same state, but for use in different states through which the stream flows, are likewise determined by the rule of priority.[2]

A state court adjudicating the respective rights of appropriators of water in an interstate stream cannot confer upon the appropriators any rights in excess of the state's equitable share of the water of the stream.[3] Also, a decree of a state court adjudicating the respective rights of appropriators of water in a stream flowing into another state is not res judicata as to that state or its citizens asserting rights as appropriators in that state where they are not made parties to the suit.[4]

Footnotes

1 State of Wyo. v. State of Colo., 259 U.S. 419, 42 S. Ct. 552, 66 L. Ed. 999 (1922), decision modified on other grounds on denial of reh'g, 260 U.S. 1, 43 S. Ct. 2, 66 L. Ed. 1026 (1922) and decree vacated on other grounds, 353 U.S. 953, 77 S. Ct. 865, 1 L. Ed. 2d 906 (1957).
In the absence of Montana legislation to the contrary, prior appropriators of the waters of an interstate stream at a point in Wyoming could acquire rights as against junior appropriators of the waters of the same stream in Montana, enforceable in Montana. Bean v. Morris, 221 U.S. 485, 31 S. Ct. 703, 55 L. Ed. 821 (1911).

2 Weiland v. Pioneer Irr. Co., 259 U.S. 498, 42 S. Ct. 568, 66 L. Ed. 1027 (1922).

3 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

4 Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92, 58 S. Ct. 803, 82 L. Ed. 1202 (1938).

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4. Priorities and Conflicts

§ 376. Adjudication of priority

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1579

Provision is made in several jurisdictions for the determination of the priority of water appropriation claims in a special proceeding for that purpose.[1] An adjudication of water rights serves the purposes of establishing the relative priorities of water users and quantifying those rights.[2] A water right owner may not be entitled to have his or her water right administered within the priority system until he or she obtains a decree by a water court confirming the water right.[3]

Where a statute confers upon a state board of control power to adjudicate, after notice, the priorities of claimants to the use of public water, any matter actually and legally determined by final decree of such board, in the absence of fraud or collusion, becomes res judicata, at least as to the public and the parties participating in the proceedings.[4] The decrees that are entered are prima facie evidence of rights between different water districts and must be enforced by the public officers entrusted with the distribution of water until they are impeached in some appropriate manner by proper proceedings.[5]

Footnotes

1 Farm Inv. Co. v. Carpenter, 9 Wyo. 110, 61 P. 258 (1900).

2 William F. West Ranch, LLC v. Tyrrell, 2009 WY 62, 206 P.3d 722 (Wyo. 2009).

3 V Bar Ranch LLC v. Cotten, 233 P.3d 1200 (Colo. 2010).

4 Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 (1896).

5 Farmers' Independent Ditch Co. v. Agricultural Ditch Co., 22 Colo. 513, 45 P. 444 (1896).

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5. Loss of Rights

§ 377. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1607

A water right acquired by appropriation may be lost by nonuse,[1] abandonment,[2] forfeiture,[3] laches,[4] adverse use,[5] or estoppel[6] but not by mere usurpation.[7] Such water right may be lost completely or partially,[8] or to a portion of the year.[9] Water rights may not be lost because of the failure to use them for a period of time if such failure is caused by circumstances beyond the control of the water right holder.[10] Economic reasons, such as high lifting costs, fuel costs, and pumping costs, however, do not constitute due and sufficient cause for the nonuse of water rights.[11]

CUMULATIVE SUPPLEMENT

Cases:

In the context of abandonment, the usufructuary nature of water rights means that nonuse retires the use entitlement to the stream. Protest of McKenna, 2015 CO 23, 346 P.3d 35 (Colo. 2015).

If an appropriator ceases to beneficially use a water right, the wasted or unused water is made available to other appropriators. West's U.C.A. § 73–1–3; U.C.A.2001, 73–1–4. Delta Canal Co. v. Frank Vincent Family Ranch, LC, 2013 UT 54, 321 P.3d 1027 (Utah 2013).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Alpine Land & Reservoir Co., 510 F.3d 1035 (9th Cir. 2007) (applying Nevada law); Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008); Frick Farm Properties, L.P. v. State, Dept. of Agriculture, Div. of Water Resources, 289 Kan. 690, 216 P.3d 170 (2009); In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012); State of N.M. ex rel. State Engineer v. Commissioner of Public Lands, 145 N.M. 433, 2009-NMCA-004, 200 P.3d 86, 241 Ed. Law Rep. 409 (Ct. App. 2008); In re General Determination of Rights to Use All of Water, Both Surface and Underground, Within Drainage Area of Utah Lake and Jordan River in Utah, Salt Lake, Davis, Summit, Wasatch, Sanpete, and Juab Counties, 2004 UT 67, 98 P.3d 1 (Utah 2004); Pacific Land Partners, LLC v. State, Dept. of Ecology, 150 Wash. App. 740, 208 P.3d 586 (Div. 3 2009).

2 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936); U.S. v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004), aff'd, 429 F.3d 902 (9th Cir. 2005) (applying Nevada law); Nicoll v. Rudnick, 160 Cal. App. 4th 550, 72 Cal. Rptr. 3d 879 (5th Dist. 2008); Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009); In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

3 U.S. v. Orr Water Ditch Co., 309 F. Supp. 2d 1245 (D. Nev. 2004), aff'd, 429 F.3d 902 (9th Cir. 2005) (applying Nevada law); In re 2007 Administrations of Appropriations of Waters of Niobrara River, 283 Neb. 629, 820 N.W.2d 44 (2012).

4 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936).

5 Yankee Jim's Union Water Co. v. Crary, 25 Cal. 504, 1864 WL 672 (1864); In re Drainage Area of Bear River in Rich County, 12 Utah 2d 1, 361 P.2d 407 (1961).

6 State of Washington v. State of Oregon, 297 U.S. 517, 56 S. Ct. 540, 80 L. Ed. 837 (1936).

7 Stubbs v. Ercanbrack, 13 Utah 2d 45, 368 P.2d 461 (1962).

8 Romero v. Bernell, 603 F. Supp. 2d 1333 (D.N.M. 2009) (applying New Mexico law); North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007); Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009); Motley-Motley, Inc. v. State, 127 Wash. App. 62, 110 P.3d 812 (Div. 3 2005).

9 North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007).

10 Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 70 P.3d 669 (2003).

11 Nelson v. State, Dept. of Agriculture, 44 Kan. App. 2d 1042, 242 P.3d 1259 (2010).

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§ 378. Abandonment

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1607

Forms

Am. Jur. Pleading and Practice Forms, Waters § 47 (Finding of fact—Partial abandonment of water right)

The abandonment of appropriated water rights requires an intent to abandon and the actual surrender or relinquishment of the water rights.[1] The mere nonuse of a water right thus is not per se abandonment.[2] An intention to abandon an appropriation of water may be inferred from acts and declarations fairly tending to manifest such a purpose.[3]

The abandonment of an appropriated water right is complete when the intention to abandon and the relinquishment of possession unite.[4] Time is not an essential element of abandonment.[5] An abandonment will not, however, be decreed for trivial matters so long as the appropriator in good faith intends to retain the claim and manifests that intention by use of the water or preparations to use it.[6] Furthermore, although ordinarily a failure to use water is evidence of an intention to abandon, and if continued for an unreasonable period it creates a presumption of an intention to abandon, this presumption is not conclusive and may be overcome by other sufficient proof.[7] Evidence rebutting the presumption of abandonment may include such acts as loaning or leasing the water to others or good faith efforts to sell the water right.[8]

Observation:

Upon the abandonment of the right of one of several appropriators, the remaining appropriators may become entitled to his or her share in the order of their respective priorities.[9]

CUMULATIVE SUPPLEMENT

Cases:

When a court decrees a water right abandoned, the property rights adhering to the particular water right no longer exist. Protest of McKenna, 2015 CO 23, 346 P.3d 35 (Colo. 2015).

A finding of abandonment of a water right requires the showing of two elements: nonuse and intent to abandon. Marks v. 71 Ranch, LP, 2014 MT 250, 334 P.3d 373 (Mont. 2014).

The courts will not lightly decree an abandonment of a property so valuable as water in a semi-arid region. Heavirland v. State, 2013 MT 313, 311 P.3d 813 (Mont. 2013).

[END OF SUPPLEMENT]

Footnotes

1 U.S. v. Orr Water Ditch Co., 256 F.3d 935 (9th Cir. 2001) (applying Nevada law); Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).
As to the loss of an appropriated water by abandonment, generally, see § 377.

2 Joyce Livestock Co. v. U.S., 144 Idaho 1, 156 P.3d 502 (2007).

3 State v. Hidalgo County Water Control and Imp. Dist. No. 18, 443 S.W.2d 728 (Tex. Civ. App. Corpus Christi 1969), writ refused n.r.e., (Dec. 9, 1970).

4 Hewitt v. Story, 64 F. 510 (C.C.A. 9th Cir. 1894); Wimer v. Simmons, 27 Or. 1, 39 P. 6 (1895).
A finding of abandonment of a water right requires the concurrence of two elements: a sustained period of nonuse and an intent to abandon. East Twin Lakes Ditches and Water Works, Inc. v. Board of County Com'rs of Lake County, 76 P.3d 918 (Colo. 2003).

5 Hewitt v. Story, 64 F. 510 (C.C.A. 9th Cir. 1894); Wimer v. Simmons, 27 Or. 1, 39 P. 6 (1895).

6 Moss v. Rose, 27 Or. 595, 41 P. 666 (1895).

7 State v. Hidalgo County Water Control and Imp. Dist. No. 18, 443 S.W.2d 728 (Tex. Civ. App. Corpus Christi 1969), writ refused n.r.e., (Dec. 9, 1970).

8 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

9 Cache La Poudre Reservoir Co. v. Water Supply & Storage Co., 25 Colo. 161, 53 P. 331 (1898).

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§ 379. Revival of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1607, 1608

Appropriated water rights in a certain location lost by nonuse cannot be reasserted so as to acquire any right therein except by a new and valid appropriation or by continued and adverse use for the statutory period of prescription.[1] The sale of an appropriator's right to use water made after abandonment of the right will not revive to the grantee his or her grantor's prior right.[2]

Observation:

Some jurisdictions recognize a resumption-of-use doctrine, which makes a statutory forfeiture of a water right ineffective when a senior appropriator resumes its use of the water source after abandonment has occurred and prior to a claim of right by a third party.[3]

CUMULATIVE SUPPLEMENT

Cases:

Futility doctrine did not apply to landowner whose water permit had been cancelled by state engineer for failure to perfect appropriation of new well, and thus, landowner was required to exhaust all available administrative remedies before seeking judicial review; even though form of relief state engineer could have offered, which was following a public hearing, modifying or rescinding the cancellation and issuing landowner a permit with current effective date, effectively placing her near end of line to appropriate water, was not the remedy that she would have preferred, it was a form of relief. West's NRSA 533.395. Benson v. State Engineer, 358 P.3d 221, 131 Nev. Adv. Op. No. 78 (Nev. 2015).

[END OF SUPPLEMENT]

Footnotes

1 Hewitt v. Story, 64 F. 510 (C.C.A. 9th Cir. 1894).

2 Davis v. Gale, 32 Cal. 26, 1867 WL 792 (1867).

3 Sagewillow, Inc. v. Idaho Dept. of Water Resources, 138 Idaho 831, 70 P.3d 669 (2003).

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6. Remedies and Actions

§ 380. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1665 to 1667, 1671, 1692 to 1694

One whose rights as to the appropriation of water have been unlawfully infringed upon may maintain an action for the recovery of damages,[1] and a threatened or continuing injury or trespass may, in a proper case, be enjoined.[2] In an action to quiet title to an appropriator's water rights and to recover punitive damages, such damages are recoverable where the defendant maliciously interfered with those rights.[3]

If an appropriator, in using water pursuant to a statutory permit, intentionally causes substantial harm to a riparian proprietor by invading the proprietor's riparian interest in the use of the waters, the appropriator is liable to the proprietor if, but only if, the harmful use is unreasonable as to the proprietor.[4]

CUMULATIVE SUPPLEMENT

Cases:

Extrinsic evidence of appropriators' intent that was not before the court that originally entered decree confirming municipal corporation's absolute and conditional appropriations to divert transmountain water from tributaries of river, and including priority for storage of diverted water in reservoir on western slope, could not be relied upon by separate court, in later change of water rights proceeding initiated by corporation, to infer separate storage right on eastern slope, as such evidence could not have formed basis for original court's supposed recognition of store right on eastern slope. Grand Valley Water Users Association v. Busk-Ivanhoe, Inc., 2016 CO 75, 386 P.3d 452 (Colo. 2016).

[END OF SUPPLEMENT]

Footnotes

1 Hoffman v. Stone, 7 Cal. 46, 1857 WL 645 (1857).
An interference with a vested right to the use of water acquired through appropriation entitles the party injured to damages. Clear Springs Foods, Inc. v. Spackman, 150 Idaho 790, 252 P.3d 71 (2011).

2 Atchison v. Peterson, 87 U.S. 507, 22 L. Ed. 414, 1874 WL 17312 (1874); Bountiful City v. De Luca, 77 Utah 107, 292 P. 194, 72 A.L.R. 657 (1930).
When there is a surplus of water in an underground basis, the holder of prior rights may not enjoin its appropriation. City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013).

3 Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969).

4 Wasserburger v. Coffee, 180 Neb. 149, 141 N.W.2d 738 (1966), opinion modified on other grounds on reh'g, 180 Neb. 569, 144 N.W.2d 209 (1966).

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6. Remedies and Actions

§ 381. Practice and procedure

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1665, 1675 to 1690(3)

Forms

Am. Jur. Pleading and Practice Forms, Waters §§ 21 to 35 (Complaints in actions involving appropriatory water rights)
Am. Jur. Pleading and Practice Forms, Waters §§ 36 to 45 (Answers and defenses in actions involving appropriatory water rights)
Am. Jur. Pleading and Practice Forms, Waters §§ 46 to 56 (Finding and judgments in actions involving appropriation of water)

In an action by a prior appropriator to protect, or to recover for injury to, his or her appropriatory rights, the complaint or petition, as in other cases, should contain a direct and positive averment of all the ultimate facts necessary to state a cause of action in the plaintiff's favor and against the defendant, followed by a demand or prayer for the relief to which the plaintiff claims to be entitled.[1]

In an action involving a dispute between appropriators as to the diversion of water, the burden of proof rests on the party asserting he or she is entitled to use the waters which have been released into a natural carrier from another water source.[2]

A decree giving "all" of the water from a certain source to a senior appropriator is valid when all of the water is being beneficially used with no waste.[3] A decree awarding an appropriator a certain quantity of water from a stream becomes operative immediately

in the absence of a supersedeas or stay of proceedings.[4] A decree which merely restricts the rights of one claimant does not establish any right in another.[5]

CUMULATIVE SUPPLEMENT

Cases:

Colorado law attempts to balance the need for conditional water rights against the risk of speculation by requiring the holder of the conditional right to act with reasonable diligence to complete the appropriation; to that end, every six years, the holder of the water right must file an application for a finding of reasonable diligence with the water court. Colo. Rev. Stat. Ann. § 37-92-301(4)(a)(I). Yellow Jacket Water Conservancy District v. Livingston, 2013 CO 73, 318 P.3d 454 (Colo. 2013).

[END OF SUPPLEMENT]

Footnotes

1 State ex rel. Crowley v. District Court of Sixth Judicial Dist. in and for Gallatin County, 108 Mont. 89, 88 P.2d 23, 121 A.L.R. 1031 (1939).
As to the statement of a cause of action, particular averments, and a prayer for relief in a complaint or petition, generally, see Am. Jur. 2d, Pleading §§ 124 to 150.

2 Hidden Hollow Ranch v. Fields, 2004 MT 153, 321 Mont. 505, 92 P.3d 1185 (2004).

3 Village of Peck v. Denison, 92 Idaho 747, 450 P.2d 310 (1969).

4 Porter v. Small, 62 Or. 574, 120 P. 393 (1912), modified on other grounds, 62 Or. 574, 124 P. 649 (1912).

5 State v. Laramie Rivers Co., 59 Wyo. 9, 136 P.2d 487 (1943).

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V. Acquisition of Water and Water Rights

B. Prescription and Adverse Use

1. In General

§ 382. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1765, 1768 to 1769(2), 1781 to 1784

Subject to certain exceptions and limitations, title to water[1] or water rights[2] ordinarily may be acquired by prescription or adverse use. An adverse holding of land and of an easement constituting the use of water are exactly parallel, so far as the similarity of the property will admit.[3]

As a general rule, no prescriptive rights can be acquired by an individual in public waters[4] in the absence of statutory authorization.[5] A statutory provision may specifically preclude the acquisition of prescriptive water rights as against the state, thereby making any adverse water use a trespass rather than the commencement of a prescriptive period against the state.[6]

An adverse possession claim may not be recognized against the stream but may be recognized against another claimant for the ownership of that person's water rights behind the headgate, that is, after the water has been diverted from the stream pursuant to an adjudicated water right.[7] In some jurisdictions, the acquisition of water rights by adverse use or possession is prohibited by statute.[8] Other authority holds that no person can adversely possess an abandoned water right.[9]

CUMULATIVE SUPPLEMENT

Cases:

Water right owner properly petitioned District Court to certify to Water Court the determination of existing rights at issue in water controversy involving right owner's claim that diverting water from a natural channel of a river had adversely affected

the water available to satisfy his water right in a creek; although the rights at issue had been decreed, they were subject to a temporary preliminary decree and had not been conclusively determined. MCA 85–2–406(2)(b). Fellows v. Saylor, 2016 MT 45, 382 Mont. 298, 367 P.3d 732 (2016).

[END OF SUPPLEMENT]

Footnotes

1 Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).
As to the acquisition, by adverse possession, of title to land under or surrounded by water or to accretions, see Am. Jur. 2d, Adverse Possession § 265.

2 North Kern Water Storage Dist. v. Kern Delta Water Dist., 147 Cal. App. 4th 555, 54 Cal. Rptr. 3d 578 (5th Dist. 2007); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).
As a species of property, littoral rights are subject to claims of adverse possession and prescriptive easement. Caminis v. Troy, 300 Conn. 297, 12 A.3d 984 (2011).
Rights to artificial bodies of water may arise by easements by prescription. Alderson v. Fatlan, 231 Ill. 2d 311, 325 Ill. Dec. 548, 898 N.E.2d 595 (2008).
The riparian right can be severed from the riparian land by prescription. Mohawk Valley Water Authority v. State, 78 A.D.3d 1513, 910 N.Y.S.2d 780 (4th Dep't 2010), leave to appeal denied, 17 N.Y.3d 702, 929 N.Y.S.2d 93, 952 N.E.2d 1088 (2011).

3 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

4 City of Auburn v. Union Water-Power Co., 90 Me. 576, 38 A. 561 (1897).

5 Attorney General v. Revere Copper Co., 152 Mass. 444, 25 N.E. 605 (1890).

6 People v. Shirokow, 26 Cal. 3d 301, 162 Cal. Rptr. 30, 605 P.2d 859 (1980).

7 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

8 Otter Creek Reservoir Co. v. New Escalante Irrigation Co., 2009 UT 16, 203 P.3d 1015 (Utah 2009).

9 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

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B. Prescription and Adverse Use

1. In General

§ 383. Rights which may be acquired

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1781 to 1791

Subject to the limitation that no person may acquire a prescriptive right to maintain a public nuisance[1] and to the general rule that no prescriptive rights can be acquired by an individual in public waters,[2] as a general proposition, a prescriptive right may be acquired to use water in any way in which it is susceptible of use and also to use lands in connection therewith.[3] Included among the rights which may thus be acquired are the right of an upper riparian owner, as against a lower riparian owner, to use water from a natural watercourse;[4] the right to divert all of the water in a particular stream;[5] the right to divert a stream running through another's land;[6] the right to maintain a dam, lake, or pond at a particular height or level;[7] the right to an easement over a reservoir for recreational purposes;[8] the right to a flowage easement;[9] the right by the public to travel over a nonnavigable stream and its bed;[10] the right to use a spring house;[11] the right to flood land;[12] and bathing rights.[13]

Footnotes

1 Am. Jur. 2d, Nuisances § 390.
2 § 382.
3 Cary v. Daniels, 49 Mass. 466, 8 Met. 466, 1844 WL 4311 (1844).
4 Knauth v. Erie R. Co., 219 A.D. 83, 219 N.Y.S. 206 (2d Dep't 1926).
5 City of Waterbury v. Town of Washington, 260 Conn. 506, 800 A.2d 1102 (2002).
6 Dimmock v. City of New London, 157 Conn. 9, 245 A.2d 569, 42 A.L.R.3d 417 (1968).
7 People v. System Properties, Inc., 2 N.Y.2d 330, 160 N.Y.S.2d 859, 141 N.E.2d 429 (1957).

8 Frech v. Piontkowski, 296 Conn. 43, 994 A.2d 84 (2010).

9 Terlecki v. Stewart, 278 Mich. App. 644, 754 N.W.2d 899 (2008); Douville v. Pembina County Water Resource Dist., 2000 ND 124, 612 N.W.2d 270 (N.D. 2000).

10 Buffalo River Conservation and Recreation Council v. National Park Service, 558 F.2d 1342 (8th Cir. 1977) (applying Arkansas law).

11 Dohle v. Duffield, 2012 Ark. App. 217, 2012 WL 1021493 (2012).

12 Meyers v. Kissner, 149 Ill. 2d 1, 171 Ill. Dec. 484, 594 N.E.2d 336 (1992).

13 Miller v. Lutheran Conference & Camp Ass'n, 331 Pa. 241, 200 A. 646, 130 A.L.R. 1245 (1938).

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V. Acquisition of Water and Water Rights

B. Prescription and Adverse Use

1. In General

§ 384. Elements and requisites of acquisition of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1771 to 1778

The elements that create a claim of a prescriptive water right include use that is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted, under a claim of right, and for a prescribed period of time.[1] It is not necessary that the claim be undisputed or that the acts done under it be actually acquiesced in,[2] and such acts may, indeed, be forbidden by the person affected by them provided no respect is given to his or her prohibition and the user is unaccompanied by an actionable disturbance.[3] A water right thus is created by prescription by an adverse use of a privilege with the knowledge of the person against whom it is claimed, or by a use so open, notorious, visible, and uninterrupted that knowledge will be presumed and exercised under a claim of right adverse to the owner and acquiesced in by him or her for a period equal at least to that prescribed for acquiring title by adverse possession.[4]

Observation:

Where an appropriative taking of water is wrongful, it may ripen into a prescriptive right if the use is actual, open and notorious, hostile and adverse to the original owner, continuous and uninterrupted for the prescribed period of time, and under a claim of right.[5]

Footnotes

1 Brewer v. Murphy, 161 Cal. App. 4th 928, 74 Cal. Rptr. 3d 436 (5th Dist. 2008).

2 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

3 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

4 Rollins v. Blackden, 112 Me. 459, 92 A. 521 (1914).

In order for a party to obtain riparian rights against the true owner through adverse possession, he or she must show actual, hostile, exclusive, and continuous possession for the period of the statutory bar by acts of such notoriety that the true owner has actual knowledge, or may be presumed to know, of the adverse claim. Scott v. Burwell's Bay Imp. Ass'n, 281 Va. 704, 708 S.E.2d 858 (2011).

5 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013).

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2. Adverseness of Use

§ 385. Generally

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1773

The mere use of water for the prescribed prescriptive period is not sufficient of itself to confer prescriptive title.[1] The use must be adverse; otherwise, it can never ripen into a prescriptive title, no matter how long it is continued.[2] A use is adverse if it deprives the owner of water to which he or she is entitled or invades the rights of the owner so as to afford him or her grounds of action.[3]

Footnotes

1 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

2 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

3 Pleasant Valley Canal Co. v. Borror, 61 Cal. App. 4th 742, 72 Cal. Rptr. 2d 1 (5th Dist. 1998).

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§ 386. Permissive use; use by license

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1773

A use of water or water rights can never be adverse if it is by permission of the owner, for the owner cannot have any right of action for acts which he or she expressly sanctions.[1] Further, where it appears that the use relied on is enjoyed in common with the public, which in no sense deprives the owner of his or her rights, and consists merely of the consumption of a surplus for which the owner has no use, it cannot be considered adverse.[2]

If the use relied upon to establish title by prescription began under a license, and the nature of the use never changed, no prescriptive right is established.[3] However, the mere fact that a use which is relied on to show a prescriptive title was first instituted under a license is not fatal to the title claimed, if it is shown that the use subsequently became adverse and was continued as such for the prescriptive period.[4] This is true even though the license is unlimited in point of time.[5]

Footnotes

1 Eliopulos v. Kondo Farms, Inc., 102 Idaho 915, 643 P.2d 1085 (Ct. App. 1982); Stratton v. West, 201 S.W.2d 80 (Tex. Civ. App. San Antonio 1947).
Language in permits made it clear that a landowner's use of a channel that connected a lake and pond had always been permissive so that no prescriptive riparian rights ever arose. Bloomquist v. Commissioner of Natural Resources, 704 N.W.2d 184 (Minn. Ct. App. 2005).

2 Jobling v. Tuttle, 75 Kan. 351, 89 P. 699 (1907).

3 Lane v. Miller, 27 Ind. 534, 1867 WL 2922 (1867).

4 Holm v. Davis, 41 Utah 200, 125 P. 403 (1912).

5 Lawrie v. Silsby, 76 Vt. 240, 56 A. 1106 (1904).

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§ 387. Use by or affecting appropriator or riparian proprietor

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1773

Whether a use of water is adverse to a riparian owner or an appropriator depends solely on the question whether that use is an infringement of his or her rights. A use of the water of a stream or lake by a common proprietor, although excessive, is not adverse, so as to ripen into a prescriptive right, however long continued, so long as it is the common use and so long as other common owners are not injured thereby or prevented or excluded from making such use as of common right belonging to them.[1] Similarly, when the use relied upon is the lawful exercise of a riparian right, it cannot ordinarily be regarded as so adverse as to constitute the basis of a prescriptive right as against other proprietors.[2]

A distinction in this respect is to be noted as between an upper and a lower proprietor. After water passes the lands of a riparian proprietor, or the point of diversion of an appropriator, he or she has no further right to its use, and nothing that can be done to or with it would seem to concern him or her or to require or authorize any action in order to prevent the accrual of a prescriptive right.[3] Thus, a lower riparian owner cannot acquire by prescription the right to the full flow of the stream as against an upper owner's right to make proper use of the water.[4] In short, prescription does not run upstream.[5] This rule, however, does not apply to a case where a lower riparian owner directly diverts water from an upper riparian owner's land, and the lower riparian owner, by doing so, may acquire prescriptive water rights as a result of adverse use.[6]

Where the use of the water is made before it reaches the lands of a riparian owner, or the point of diversion by an appropriator, a more difficult question is presented, for since such a proprietor or appropriator has the right to have the stream flow in its ordinary channel, any act or use by another which prevents it so running, if under a claim of right, must be adverse to the riparian owner.[7] Diversion of the water without return, or abstraction of the water for a nonriparian use, is an invasion of the rights of a lower proprietor, and if such diversion or abstraction is continued for the period and under the conditions requisite for

prescription, it will ripen into a prescriptive right against the lower proprietor.[8] Generally, the prescriptive period will not begin to run until some harm is done to the lower user, giving rise to a cause of action.[9] Accordingly, if the diversion is restricted to times in which there is a superabundance of water or, although not so restricted, there is left in the stream sufficient water to answer every necessity of the lower riparian proprietor, he or she suffers no injury for which an action will lie.[10]

Footnotes

1 Harris v. Brooks, 225 Ark. 436, 283 S.W.2d 129, 54 A.L.R.2d 1440 (1955) (no prescriptive right in unlimited use of water where previous use did not unreasonably interfere with the riparian owners' rights); Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905); Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

2 Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

3 Clark v. Allaman, 71 Kan. 206, 80 P. 571 (1905).

4 Harrell v. City of Conway, 224 Ark. 100, 271 S.W.2d 924 (1954); Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority, 147 Me. 149, 84 A.2d 433 (1951).

5 U. S. v. Fallbrook Public Utility Dist., 165 F. Supp. 806 (S.D. Cal. 1958).

6 Brewer v. Murphy, 161 Cal. App. 4th 928, 74 Cal. Rptr. 3d 436 (5th Dist. 2008).

7 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).

8 Kennebunk, Kennebunkport and Wells Water Dist. v. Maine Turnpike Authority, 147 Me. 149, 84 A.2d 433 (1951).

9 Knauth v. Erie R. Co., 219 A.D. 83, 219 N.Y.S. 206 (2d Dep't 1926).

10 Smith v. Duff, 39 Mont. 374, 102 P. 981 (1909); Miller v. Wheeler, 54 Wash. 429, 103 P. 641 (1909).

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3. Period and Continuity of Use

§ 388. Period of use; commencement and completion

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1776

The statute controlling the acquisition of title to a water right or the right to use land in connection therewith by adverse possession is the statute of limitations applicable to actions to recover the possession of real property, and hence the right to water may be acquired by its adverse use for the period required to acquire title to real property by adverse possession.[1] Before a prescriptive water right can be obtained, the adverse use must be continued for the statutory period.[2] However, the preparation for the diversion, ponding back, or use of water is essentially different from the diversion itself and can never set the period of limitation in motion.[3] If there is an actual diversion of water, followed within a reasonable time by application and actual use, this is sufficient to set the statute of limitations in motion as of the date of the original appropriation or diversion.[4]

Where the right to the use of the water is claimed as an incident or as appurtenant to certain land, it is not essential that the claimant should personally have been in adverse possession for the period prescribed by the statute, for if it has been used on and for the benefit of certain land for the time required to create a prescriptive title, such title vests in every subsequent owner of the land, though none of them may have used the water for the required period, so long as the different periods so used are tacked together to complete the time required to create a prescriptive title.[5] If, on the other hand, the persons using the water do not in some way connect themselves with the prior users, the use by the latter, however long continued, cannot be considered in support of the claim by prescription.[6]

Footnotes

1 Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

2 Smith v. Duff, 39 Mont. 374, 102 P. 981 (1909).

3 Branch v. Doane, 18 Conn. 233, 1846 WL 706 (1846).

4 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

5 Shaffer v. Baylor's Lake Ass'n, 392 Pa. 493, 141 A.2d 583 (1958) (tacking between members of family).

6 Oregon Const. Co. v. Allen Ditch Co., 41 Or. 209, 69 P. 455 (1902).

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3. Period and Continuity of Use

§ 389. Continuity of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1776

In order to acquire title to a water right by prescription, the adverse use must continue without interruption throughout the full prescriptive period.[1] If there is any interruption in the use of the water by the person having a paramount right or in the possession and use by any other under a claim of right, for however short a time, then the continuity of the adverse use or possession is broken.[2] An interruption may result from a suit and judgment, as where the person claiming by prescription is in possession of the land affected, and an action in ejectment is brought against him or her in which judgment for the possession of the land is entered,[3] or where the person using the water without right to do so is subjected to an action for damages, in which judgment is recorded against him or her.[4] An interruption may also result where the riparian owners engage in self-help measures and retain their rights by using the water.[5]

An adverse use, if uninterrupted, may be continuous although not constant.[6] It suffices if the claimant has exercised the right from time to time as his or her necessities require since he or she need not use the water at all times nor even every day or every week.[7] No prescriptive right, however, can be acquired if the adverse use is of irregular and infrequent occurrence.[8]

Footnotes

1 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000); Grammas v. Colasurdo, 48 N.J. Super. 543, 138 A.2d 553 (App. Div. 1958).

2 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000).

3 Alta Land & Water Co. v. Hancock, 85 Cal. 219, 24 P. 645 (1890).

4 Harmon v. Carter, 59 S.W. 656 (Tenn. Ch. App. 1900).

5 City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000) (pumping of water by overlying owner as interrupting prescriptive period).

6 Swan v. Munch, 65 Minn. 500, 67 N.W. 1022 (1896).

7 Swan v. Munch, 65 Minn. 500, 67 N.W. 1022 (1896).
Recreational use of artificial, nonnavigable reservoir by adjacent landowners was uninterrupted for over 15 years, as required to support the landowners' claim for a prescriptive easement for recreational uses on the reservoir, even if the landowners did not use their boat every year and the landowners continuously made other uses of the reservoir, including swimming, fishing, and skating. Frech v. Piontkowski, 296 Conn. 43, 994 A.2d 84 (2010).

8 Wills v. Babb, 222 Ill. 95, 78 N.E. 42 (1906).

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B. Prescription and Adverse Use

4. By and Against Whom Prescriptive Rights May Be Acquired

§ 390. Who may acquire prescriptive rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1766

As a general rule, prescriptive title to a water right may be acquired by any person, natural or artificial, capable of taking and holding title to the land to which such right is appurtenant.[1] A municipal corporation thus may acquire by prescription the right to the use of the water of a stream as against a lower riparian owner.[2] It is not necessary that a claimant to water rights in a stream, by prescription or adverse use, should be a riparian owner on the stream.[3] The use on which a prescriptive right is claimed may be either by the claimant or by one holding under him or her, such as a lessee or tenant.[4] However, the use of water on land to which it is already appurtenant by a trespasser will not give him or her any right in the water which would entitle him or her thereafter to divert it from the land, or on being lawfully ejected therefrom, to convey to a stranger a legal title in the water or in the use thereof.[5]

There is some authority that the public can acquire prescriptive easements in private riparian land, and where the public has acquired, over the years, an easement for recreational purposes in the dry-sand area contained within the legal description of private oceanfront property, the State has the power to prevent the landowners from fencing it off.[6]

Footnotes

1 Alabama Consol. Coal & Iron Co. v. Turner, 145 Ala. 639, 39 So. 603 (1905).
It is possible, as a matter of law, for an abutting landowner to acquire a prescriptive easement over a reservoir.
Frech v. Piontkowski, 296 Conn. 43, 994 A.2d 84 (2010).

2 Town of Gordonsville v. Zinn, 129 Va. 542, 106 S.E. 508, 14 A.L.R. 318 (1921).

3 Young v. City of Asheville, 241 N.C. 618, 86 S.E.2d 408 (1955).

4 Young v. City of Asheville, 241 N.C. 618, 86 S.E.2d 408 (1955).

5 Meng v. Coffey, 67 Neb. 500, 93 N.W. 713 (1903).

6 State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969).

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West's Key Number Digest

West's Key Number Digest, Water Law 1766

A.L.R. Library

Acquisition by adverse possession or use of public property held by municipal corporation or other governmental unit otherwise than for streets, alleys, parks, or common, 55 A.L.R.2d 554

Ordinarily, a prescriptive title to water may be asserted against any person against whom a prescriptive title to real property can be enforced.[1] Thus, one who has enjoyed adverse possession of a water right for the prescriptive period may assert title even against one to whom he or she had previously conveyed title.[2] The converse of the general proposition stated also applies. Prescriptive title to water rights cannot be asserted against one whose title to real property is unaffected by adverse possession in another.[3] Therefore, and although there seems to be some dissent from this doctrine,[4] generally, since the sovereign is not bound by the statute of limitations unless expressly named therein, prescriptive title to water cannot ordinarily be enforced against the United States or a state.[5] In some jurisdictions, an adverse possession water rights claim may not be asserted against appropriators on a stream.[6]

Footnotes

1 Hines v. Robinson, 57 Me. 324, 1869 WL 2656 (1869).

2 Hines v. Robinson, 57 Me. 324, 1869 WL 2656 (1869).

3 Wilkins v. McCue, 46 Cal. 656, 1873 WL 1359 (1873).

4 Finch, Pruyn & Co. v. State, 122 Misc. 404, 203 N.Y.S. 165 (Ct. Cl. 1924).

Where evidence in an action brought by property owners against the National Park Service sustained a finding that the public's usage of a nonnavigable river and its beds had been open and adverse for more than seven years, a prescriptive right was obtained by the public to travel over the nonnavigable stream and its bed. Buffalo River Conservation and Recreation Council v. National Park Service, 558 F.2d 1342 (8th Cir. 1977) (applying Arkansas law).

5 Morris v. U.S., 174 U.S. 196, 19 S. Ct. 649, 43 L. Ed. 946 (1899); State v. Akers, 92 Kan. 169, 140 P. 637 (1914), aff'd, 245 U.S. 154, 38 S. Ct. 55, 62 L. Ed. 214 (1917).

6 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009).

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5. Extent of Use, Loss of Rights, and Adjudication of Rights

§ 392. Extent of use

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1779

Prescriptive rights with respect to water are measured strictly by the extent of the use during the prescriptive period[1] and are limited to the amounts actually taken.[2] When a party has, for the prescriptive period, diverted all the water from a watercourse, that party has established a prescriptive easement to divert all the water, regardless of whether the diversion was later reduced or the scope of the diversion fluctuated.[3] If a party has, for the prescriptive period, not diverted all, but only a portion, of the water from a watercourse, that party will have established a prescriptive easement only for an amount that has become customary between the parties.[4] Thus, taking water through a pipe of a given size, for the prescriptive period, confers only the right to take water which will flow through the pipe at the level at which it has been maintained and not a right to keep the pipe full by lowering it as the level of the water recedes.[5]

Footnotes

1 Mason v. Yearwood, 58 Wash. 276, 108 P. 608 (1910).

2 City of Los Angeles v. City of San Fernando, 14 Cal. 3d 199, 123 Cal. Rptr. 1, 537 P.2d 1250 (1975) (disapproved of on other grounds by, City of Barstow v. Mojave Water Agency, 23 Cal. 4th 1224, 99 Cal. Rptr. 2d 294, 5 P.3d 853 (2000)).

3 City of Waterbury v. Town of Washington, 260 Conn. 506, 800 A.2d 1102 (2002).

4 City of Waterbury v. Town of Washington, 260 Conn. 506, 800 A.2d 1102 (2002).

5 Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

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§ 393. Loss or extinguishment of rights

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1792

Ordinarily, mere nonuse of a prescriptive water right will not work its extinguishment, this doctrine proceeding on the reasoning that a presumed grant has all the force and validity of an actual one.[1] There is some authority, however, to the effect that the right may be lost by nonuse.[2] Also, such a right may be extinguished by positive acts of the owner thereof which are destructive of or incompatible with the exercise of the right.[3]

Footnotes

1 Weed v. Keenan, 60 Vt. 74, 13 A. 804 (1888).

2 City of Santa Maria v. Adam, 211 Cal. App. 4th 266, 149 Cal. Rptr. 3d 491 (6th Dist. 2012), as modified without opinion on denial of reh'g, (Dec. 21, 2012) and review denied, (Feb. 13, 2013); Terlecki v. Stewart, 278 Mich. App. 644, 754 N.W.2d 899 (2008).

3 City of Harrodsburg v. Cunningham, 299 Ky. 193, 184 S.W.2d 357 (1944).

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§ 394. Adjudication and proof

Topic Summary | Correlation Table | References

West's Key Number Digest

West's Key Number Digest, Water Law 1794, 1802, 1805

Forms

Am. Jur. Pleading and Practice Forms, Waters §§ 25, 27, 38 (Complaints and answers alleging prescriptive rights and adverse user)

Am. Jur. Pleading and Practice Forms, Waters § 46 (Finding of fact—Water right acquired by prescription)

Ordinarily, one who asserts a water right by virtue of adverse use has the burden of proving satisfactorily the elements constituting adverse use[1] and all of the necessary facts to establish his or her claim to the right.[2] The claimant of the adverse possession of riparian rights or a prescriptive easement to use riparian rights must prove all the elements by clear and convincing evidence.[3]

If an upper riparian owner is making a certain use of the stream which may or may not, from the face of the act, be intended as an adverse claim against the proprietor below, it will, when the use is under inquiry, be presumed to be a riparian and not an adverse one until facts are brought home to the lower proprietor showing the use above to be adverse.[4] A wrongful diversion of water from a running stream or a lake by a common proprietor, however, is presumed to be injurious to the other proprietors, and therefore adverse, so as to ripen into a right if continued for the statutory period.[5] Evidence of long-continued use, without

interference, of water from a stream, body, or conduit claimed by another will justify the inference that the use was rightful and adverse.[6]

Application to the owner of a servient tenement for a grant of the right to use water, if made within the period of limitations, is evidence of an admission that the applicant had no title to such use by prescription.[7]

Footnotes

1 Archuleta v. Gomez, 200 P.3d 333 (Colo. 2009); Knauth v. Erie R. Co., 219 A.D. 83, 219 N.Y.S. 206 (2d Dep't 1926).

2 In re Drainage Area of Bear River in Rich County, 12 Utah 2d 1, 361 P.2d 407 (1961).

3 Scott v. Burwell's Bay Imp. Ass'n, 281 Va. 704, 708 S.E.2d 858 (2011).
The clear and convincing evidence standard is used when establishing prescriptive title to the water right of another. A & B Irr. Dist. v. Idaho Dept. Of Water Resources, 153 Idaho 500, 284 P.3d 225 (2012).

4 Seneca Consol. Gold Mines Co. v. Great Western Power Co. of California, 209 Cal. 206, 287 P. 93, 70 A.L.R. 210 (1930).

5 Kennedy v. Niles Water Supply Co., 173 Mich. 474, 139 N.W. 241 (1913).

6 Garbarino v. Noce, 181 Cal. 125, 183 P. 532, 6 A.L.R. 1433 (1919).

7 Watkins v. Peck, 13 N.H. 360, 1843 WL 2073 (1843).